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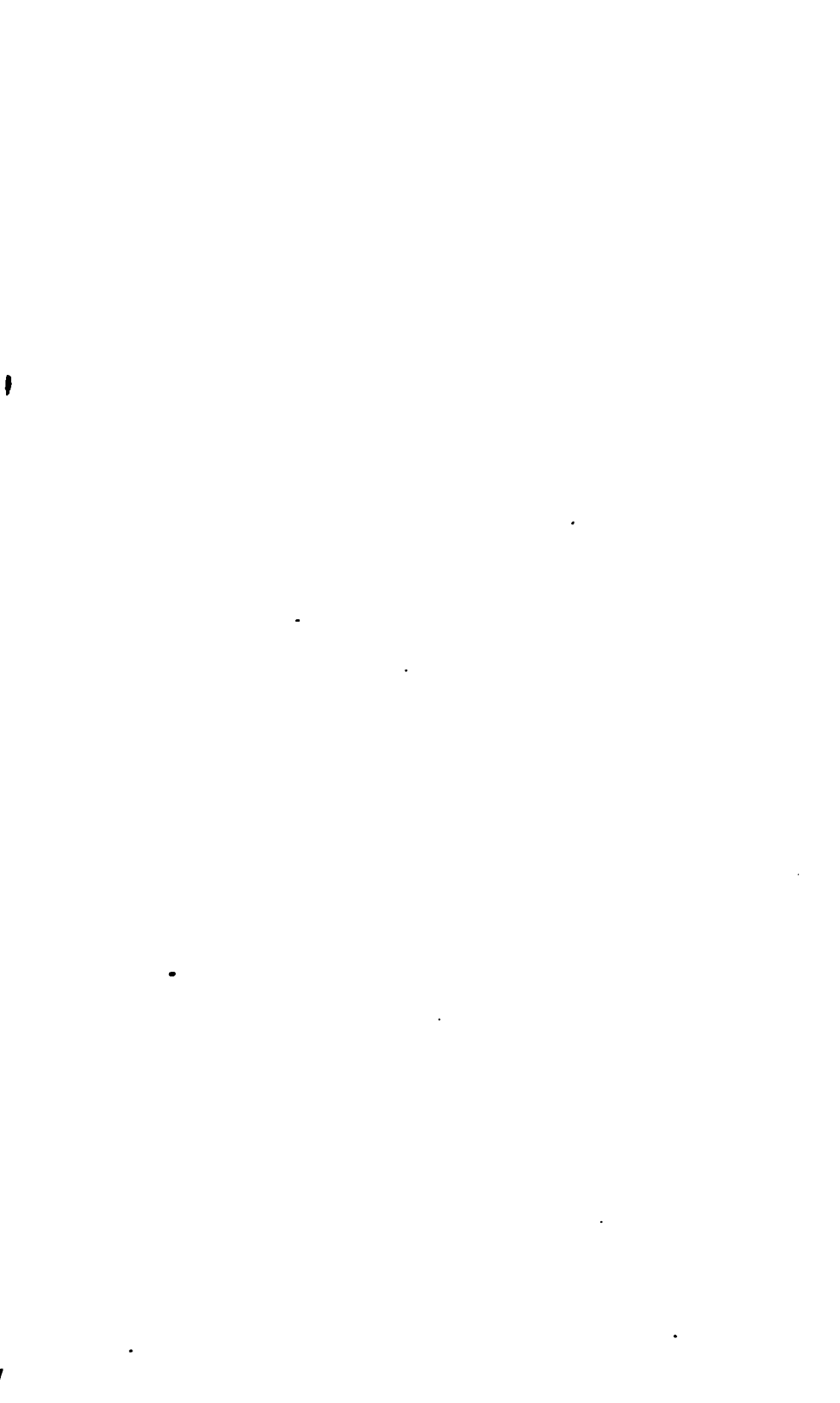
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THE

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THE AMERICAN LAW REGISTER.

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THE RIGHT TO ALIMONY AFTER DIVORCE.

IN view of the state of the authorities it is very difficult to assert a general rule governing this subject, and this difficulty has been increased instead of lessened by the courts failing to separate this question from jurisdictional questions of the domicile and of the *delictum*, and of the effect of an *ex parte* decree of divorce, as well as the failure to distinguish between the doctrine of maintenance and that of alimony.

At the bottom of this question there are three propositions: 1st, a marriage valid where it is solemnized or contracted, is valid everywhere; 2d, a divorce valid where decreed, is valid everywhere; 3d, the allowance of alimony valid where made, is valid everywhere. These propositions have not been universally approved and adopted, but they are supported by the weight of authority, and have more common sense and principle for their basis than any other view.

From the adjudications two propositions are deducible; one, that alimony is only an incident of a divorce, and not a subject matter or right grantable in an independent separate proceeding, where it is the only relief sought, unless the state statute so provides and makes it an independent right. It therefore follows that the court which grants the divorce can only allow the alimony; that no court, unless expressly so empowered by the statute, has power to grant alimony alone; and that if the court which decrees the divorce fails to allow alimony, or allows inadequate alimony, no other court can act in the matter—for when any matter is deter-

mined by a court of competent jurisdiction, that is the end of that matter, and all other matters belonging to and which might have been determined in that proceeding or litigation. The other proposition is the reverse of this, holding that alimony is not only an incident or concomitant of a divorce, but that it is the subject of an original jurisdiction, *per se*, and can be obtained in an independent proceeding, and that, too, before or after the divorce proceeding is ended, and for the same cause or causes for which the divorce was granted; that it is incident to a divorce only in the meaning that it may follow a divorce in the divorce proceedings, not necessarily attached to it, nor in the same proceeding or court, but obtainable after the divorce is granted either in a domestic or a foreign tribunal.

Referring to the first proposition, the reasoning would be that if alimony is only an incident of or to a divorce, it cannot be the subject-matter of original jurisdiction, because an incident of or to a matter is not the matter itself. If this is correct, then the court having jurisdiction of the divorce has *ipso facto* jurisdiction of the alimony, and it therefore follows that a court having jurisdiction to decree an *ex parte* divorce, can also decree alimony in that *ex parte* proceeding which would be an *ex parte* judgment for money, without jurisdiction *in personam* or *in rem*, a conclusion almost generally repudiated: *Mills v. Duryee*, 7 Cranch 481; *Webster v. Reid*, 11 How. (U. S.) 437; *Nations v. Johnson*, 24 Id. 195; *Boswell v. Otis*, 9 Id. 336; *McElmoyle v. Cohen*, 13 Pet. 312; 2 Am. L. Ca. 551; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165. If the first proposition (that alimony is an incident of divorce) is correct, the court must have jurisdiction of the divorce or it cannot determine the alimony; hence it follows that to know what will constitute a valid decree for the latter, we must know what confers jurisdiction of divorce. If the second proposition is true this is not necessary, because proceedings for alimony alone would be governed by the law applicable to all proceedings for money only.

The first proposition is supported, I believe, by the weight of authority, yet the conclusions legitimately flowing therefrom are rejected, hence the question of jurisdiction in divorce is important.

It is settled that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law without

regard to the place of the marriage or place of the *delictum*: Story Conf. L., sect. 230; *Harding v. Alden*, 9 Greenl. 140; *Tolen v. Tolen*, 2 Blackf. 407; *Wall v. Williamson*, 8 Ala. 48; *Harrison v. Harrison*, 19 Id. 499; *Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Id. 260; *Fellows v. Fellows*, 8 N. H. 160; *Pawling v. Bird*, 13 Johns. 192; *Maguire v. Maguire*, 7 Dana 181. This means the domicile of both husband and wife.

This proposition is not disputed, but there are other propositions involved in or growing out of this which are disputed, such as whether the domicile of one of the parties is sufficient, and whether or not this domicile means the domicile at the time of the *delictum*. Domicile is the place where a person lives, and as applicable to marriage it is the place where both husband and wife live (Story Conf. L., sect. 41; Phill. Dom. 11; 2 Bish. M. & D. Ch. 8); their then permanent place of abode as to all present intents and purposes.

The wife's domicile is in the place where the husband lives, because the law considers husband and wife one person, and its policy is that they cohabit together: *Harteau v. Harteau*, 14 Pick. 181; *Colvin v. Reed*, 55 Penn. St. 375; *Greene v. Greene*, 11 Pick. 410; *Hairston v. Hairston*, 27 Miss. 704; *Smith v. Morehead*, 6 Jones Eq. 360; *Williams v. Saunders*, 5 Cald. 60; 2 Bish. M. & D. ch. 9. This domicile once fixed continues until changed. It can be changed by the joint removal of the domicile *animus non revertendi*, or by either upon the commission of the *delictum* against the matrimonial consortium. If the husband commits the *delictum* the wife can refuse cohabitation and establish a domicile of her own, separate and independent from the husband, because if she cohabit after the *delictum*, it will be condonation. The misconduct of the husband gives her this right: *Irby v. Wilson*, 1 Dev. & Bat. Eq. 568; *Stevens v. Stevens*, 1 Met. 279; *Davis v. Davis*, 30 Ill. 180; *Masten v. Masten*, 15 N. H. 159; *Kashaw v. Kashaw*, 3 Cal. 312; *Harrison v. Harrison*, 20 Ala. 629; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Smith v. Smith*, 4 Greene (Iowa) 266; *Coddington v. Coddington*, 5 C. E. Greene 263; *Lyon v. Lyon*, 2 Gray 367. "The wife can acquire a separate domicile whenever it is necessary and proper for her to do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her

domicile. The place of the marriage, of the offence and the domicile of the husband are of no consequence:" *Cheever v. Wilson*, 9 Wall. 108; *Bennett v. Bennett*, Deady 299. Hence, if she has the right to establish a new domicile, she can sue in the old domicile or in the new. If she can sue in the new domicile she can obtain an *ex parte* decree. But some cases have held that the wife must sue in the domicile existing at the time of the *delictum*: *Hopkins v. Hopkins*, 35 N. H. 474; *Schonwald v. Schonwald*, 2 Jones Eq. 367; *Kruse v. Kruse*, 25 Mo. 68; *Ashbaugh v. Ashbaugh*, 17 Ill. 476. This apparent conflict will be reconciled. The same rule applies to the husband; hence, if she commits the *delictum*, the husband can sue in the forum of the domicile existing at the time of the offence, or establish a new domicile and sue in that new one: *Warrender v. Warrender*, 2 Cl. & F. 488; *Chichester v. Donegal*, 1 Add. Ecc. 5; *Borden v. Fitch*, 15 Johns. 121; *Greene v. Greene*, 11 Pick. 410; *Hull v. Hull*, 2 Strobh. Eq. 174; *Hare v. Hare*, 10 Tex. 355; *Hood v. Hood*, 11 Allen 196.

- Alimony is a provision for the support or maintenance of the wife, grantable by a court and payable by the husband: *Burr v. Burr*, 7 Hill 207; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Rogers v. Vines*, 6 Ired. 293. It is 1st, temporary, and 2d, permanent. Temporary when granted: 1st, *pendente lite*, and 2d, as a separate support or maintenance. Permanent when allowed as a permanent provision for support upon a divorce *a vinculo*.

- The jurisdiction of our courts over the matter of alimony is derived from the English courts, or is statutory, or both.

- In England, before the Cromwellian period and after the restoration until 1858, the ecclesiastical courts had exclusive jurisdiction of divorce and alimony, and did not grant alimony but in the proceedings resulting in the divorce. During the Cromwellian period these courts did not exist. Their jurisdiction as to alimony was exercised by the judges of the chancery court but did not extend to divorces, for the reason that the then governmental policy and the express language of their commission limited the jurisdiction to causes of alimony alone: Fonb. Eq. 96, 97; *Oxenden v. Oxenden*, 2 Vern. 493; *Head v. Head*, 3 Atk. 295; *Lasbrook v. Tyler*, 1 Rep. Ch. 44; *Ashton v. Ashton*, Id. 164; *Watkins v. Watkins*, 2 Atk. 96; *Duncan v. Duncan*, 19 Ves. 394; *Wilkes v. Wilkes*,

2 Dick. 791; *Nicholls v. Danvers*, 2 Vern. 671; *Williams v. Callow*, Id. 752; 2 Bright. H. & W. 354; *Shelford Mar. & Div.* 598; *Reeves Dom. R.* 209; 2 Story Eq., sect. 1422 *et seq.*

The ecclesiastical courts assumed jurisdiction to decree alimony *only* when they decreed a separation, *because* 1st, from the earliest period alimony was administered as an incident to a separation, and not as an original right. 2d. It had no existence at common law or in chancery as a separate and independent right, but was recognised as an incident to a proceeding for some other purpose, such as a *supplicavit* or divorce, hence the ecclesiastical courts did not assume original jurisdiction of alimony alone, but only as an incident to its divorce jurisdiction. This was in harmony with the origin and history of divorce and alimony, with the chancery court's jurisdiction and with the recognition at common law. It follows that prior to the year 1858 no court in England had any power to grant alimony when that was the only relief sought. It could only be done as an incident to something else: *Head v. Head*, 3 Atk. 547; *Ball v. Montgomery*, 2 Ves. 191. In *Ball v. Montgomery* the court said that "no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in equity upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that the chancellor will allow her separate maintenance. So in the ecclesiastical court if it (alimony) is necessary upon a divorce *à mensâ et thoro propter savitiam*." Although the writ of *supplicavit* has been seldom used (2 Story's Equity Jurisprud., sects. 1422, 1423, 1476; 2 Roper Husband and Wife 309, 317, 320; Clancy M. W. 453; *Codd v. Codd*, 2 Johns. Ch. 141), it shows how alimony is incidental to a divorce, and in a late case (*Adams v. Adams*, 100 Mass. 365,) the court said that alimony alone was never granted by this process. Its purpose and object was to protect the wife from violence and abuse, and to accomplish this it was necessary sometimes to direct a separation for the time being, and separate maintenance for the wife whilst the separation continued.

This doctrine in England was admitted for the reason that granting alimony or separate maintenance, without the primary and concurrent decree of divorce, was compelling the husband to

support his wife in a manner contrary to law. The husband is not compelled, under the law, to support his wife but in cohabitation, unless he consents that she shall live separate, or commits some matrimonial offence entitling her to refuse cohabitation. If he has done either of these she can pledge his credit for her temporary separate maintenance. If something more is wanted, she can obtain a permanent provision concurrent with a separation. To decree a separate provision or alimony without a separation is against public policy.

An adjudication allowing the wife to live separate from the husband, is a necessary foundation for an adjudication compelling him to support her in a separate state. Cohabitation is the state and condition which the law imposes, and for which marriage was instituted. This state or condition must exist until the law allows a separation, hence the court must first adjudge a separation before it can adjudge a support during that separation. The first question is, shall cohabitation cease to exist (temporarily or permanently), and when this is determined the question of support or alimony arises. This is the first question whether the application be for alimony alone, or divorce and alimony, and it follows that if the court has no jurisdiction over the one question it can have none over the other; the one is concurrent and commensurate with the other, and neither exists without the other.

Notwithstanding the foregoing proposition and the reasons for it, there are cases holding the reverse of what has been stated.

In *Oxenden v. Oxenden*, 2 Vern. 493, the chancery court, on an independent application, granted a separate maintenance, and also in *Nicholls v. Danvers*, 2 Vern. 671, decreed to the wife for her separate maintenance funds in the husband's possession which came to her from her deceased mother's estate. In *Williams v. Callow*, 2 Vern. 752, the chancery court, upon an application for a separate maintenance alone, decreed the interest of a trust bond given for the wife's portion. In these cases there was neither a divorce nor an agreement to live separate.

The same rule was held in *Lasbrook v. Tyler*, 1 Cha. R. 44, and *Watkins v. Watkins*, 2 Atk. 96; *Duncan v. Duncan*, 19 Ves. 394; 1 Fonb. Eq. 94, 104.

On the other hand Lord LOUGHBOROUGH, in *Ball v. Montgomery*, 2 Ves. 195, said that he did not recollect any such cases as were cited from Vernon, and asserted the broad doctrine that a mar-

ried woman should not be a plaintiff in a suit in equity for a separate maintenance, and no court had original jurisdiction to award it. This ruling was followed in *Stones v. Cooke*, 7 Sim. 22; *Vandergucht v. DeBlaquisere*, 8 Id. 815.

Story's Equity Jurisprudence seems to have asserted both sides of the question. In one section (1422), it is asserted that, although it is the duty of the husband to provide a suitable maintenance for his wife, it is not a duty, to decree separate maintenance only, of which equity will assume jurisdiction: citing *Ball v. Montgomery*, 2 Ves. 195; *Head v. Head*, 3 Atk. 550; *Legard v. Johnson*, 3 Ves. 359; *Clancy* 549; *Foden v. Finney*, 4 Russ. 428; *Galland v. Galland*, 38 Cal. 265. If the husband does not provide suitable maintenance, the proper remedy is by an action against the husband by any person who has supplied her with necessaries: citing *Guy v. Pearkes*, 18 Ves. 196; *Harris v. Morris*, 4 Esp. 41; *Hodges v. Hodges*, 1 Id. 441; *Bolton v. Prentice*, 2 Stra. 1214; *Hindley v. The Marquis*, 6 B. & C. 200; *Eames v. Sweetser*, 101 Mass. 78; and if this reliance for support should be precarious, the wife may make an application to the ecclesiastical court for a decree *d mensâ et thoro*, or for a restitution of conjugal rights upon which a suitable separate maintenance may be allowed: citing *Ball v. Montgomery*, *supra*; *Clancy* on H. & W. 549; 1 Fonbl. Eq., ch. 2. But in America equity will, in such cases, decree a wife a separate maintenance, upon the ground that there is no adequate or sufficient remedy at law: citing *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Patterson v. Patterson*, 1 Halst. Ch. 389, which do not support the text. The remedy at law here referred to means the action by a third person against the husband for necessaries supplied to the wife; yet in the succeeding section it is asserted that equity has not general jurisdiction to decree separate maintenance out of the husband's property, except on agreement, &c., but may out of her own equitable estate.

This English doctrine of alimony or separate maintenance was limited to *supplicavit*, agreement, and upon a divorce *d mensâ et thoro*. It was carried into the jurisprudence of some of the states, and extended to awarding alimony upon an independent application, and without being connected with a divorce, and ultimately to granting it after a divorce *a vinculo* in an independent proceeding, and whether it had been previously asked or not. This jurisdiction in some states was assumed and exercised on the ground that it

belonged to the general jurisdiction of equity, although there existed no ecclesiastical courts. It can thus easily be seen how this jurisdiction originated and grew. Equity decreed the separate maintenance as an incident to some other subject-matter of which equity had original jurisdiction. The ecclesiastical courts decreed it as incident to divorce, and neither, except during the Cromwellian period, decreed it on an independent proceeding as a substantive subject of jurisdiction.

In Alabama, California, Kentucky, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee and Virginia, and possibly Ohio, the jurisdiction of equity to decree alimony alone has been more or less asserted and exercised. In all the other states the jurisdiction is denied. In both cases the state statutes may exercise an influence in determining the question.

In the year 1707 this question came under consideration in Maryland in *MacNamara's Case*, 2 Bland. Ch. 566, and the court allowed alimony without a divorce, asserting such jurisdiction as general and original in the absence of ecclesiastical courts. This was followed in *Lynthecumb's Case* in 1738, and *Scott's Case* in 1746, and *Gavane's Case* in 1750 (all reported in 2 Bland. 566), and asserted in *Golwith's Case*, 4 Har. & McH. 477, apparently decided in 1689. This jurisdiction was confirmed by statute in 1777, which gave the court of chancery full power to hear and determine all causes for alimony, but it was understood that the jurisdiction did not extend to granting divorce. It was said in *Jamison v. Jamison*, 4 Md. Ch. 289, that alimony was so granted because "it is the duty of the husband to provide a suitable maintenance for his wife, and if he will not do so some proper remedy should be provided to compel him. The action at law whereby the person who supplies her with necessaries may sue the husband is a precarious and uncertain reliance for support. It is better that some proceeding be instituted by which the husband will be compelled to pay alimony or that the wife be restored to her conjugal rights, and as we have no jurisdiction over applications of the latter kind, it is best to grant alimony. This court had jurisdiction before the revolution to grant alimony independent of the application for divorce." This is the principle or doctrine adopted and followed in this state (*Helms v. Franciscus*, 2 Bland. Ch. 565; *Wallingsford v. Wallingsford*, 6 H. & J. 485; *Harding v. Harding*, 22 Md. 337; *Keerl v. Keerl*, 34 Id. 21; *J. G. v. H. G.*, 33 Id. 401; *Schindel*

v. Schindel, 12 Id. 294 ; *Dunnoch v. Dunnoch*, 3 Id. Chan. 140), and the courts have never gone to the extent of granting alimony in a separate proceeding after a divorce *a vinculo*, except in *Crane v. Meginnis*, 1 Gill & J. 463, which followed *Richardson v. Wilson*, 8 Yerg. 67, holding that in a proper case there may be a judicial decree for alimony after a legislative divorce, but this seems to be against authority and the reason and policy of the law.

In North Carolina in 1796 (*Spiller v. Spiller*, 1 Hayw. 482 ; *Knight v. Knight*, 2 Id. 101), bills in equity by the wife against the husband for alimony alone were sustained without question. This jurisdiction has been sustained in later cases (*Schonwald v. Schonwald*, Phil. Eq. 215 ; *Hodges v. Hodges*, 82 N. C. 122), but such jurisdiction has not been stretched to grant alimony after a divorce *a vinculo*.

This inherent jurisdiction of chancery to grant alimony has been asserted and adopted in Virginia (*Purcell v. Purcell*, 4 Hen. & Munf 507 ; *Almond v. Almond*, 4 Rand. 662), approving *Duncan v. Duncan*, 19 Ves. 394, and rejecting *Head v. Head*, 3 Atk. 295, and *Ball v. Montgomery*, 2 Ves. Jr. 195. The cases in this state follow the reasons for asserting the chancery jurisdiction given in the Maryland cases, but did not grant it after divorce *a vinculo*, and do not make distinction between alimony and a separate maintenance.

In Alabama the court (*Glover v. Glover*, 16 Ala. 442 ; *Wray v. Wray*, 33 Id. 187 ; *Turner v. Turner*, 44 Id. 437), at an early period asserted and exercised original jurisdiction over the subject of alimony, and in *Glover v. Glover*, after a careful review of the English cases said, that the court was "free to adopt a rule of decision for ourselves which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based," and therefore the courts would in harmony with the courts of Virginia, South Carolina and Kentucky, grant alimony in a proper case on an independent application, because the husband is bound to support his wife. "If law and conscience create this obligation, and no court can enforce its performance or compensate for its violation, then this class falsifies the maxim that for every wrong there is a remedy, and for every injustice an adequate and salutary relief." CHILTON, J., in *Glover v. Glover*.

This applies to a separate maintenance, but in *Turner v. Turner*, the court applied the doctrine after divorce *a vinculo*. In that case husband and wife resided in Alabama. The husband abandoned his wife, went to Indiana and procured an *ex parte* decree of divorce. The wife sued in Alabama for divorce and alimony. The husband pleaded the Indiana divorce as a bar, and the court held that it was not a bar. Said PETERS, J.: "The Indiana divorce cannot affect the wife's rights, except her right in the husband as husband. It unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony. It does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state in the event she should survive him, nor any other interest of a pecuniary character she may have against him." But this decision should be placed on the principle that the decree of divorce was *ex parte*, not obtained at the *bona fide* domicile or the place of the offence, the grounds upon which jurisdiction is taken, and hence could not and did not affect the wife. This will accord with *Shannon v. Shannon*, 4 Allen 134; *Smith v. Smith*, 13 Gray 209; *Cox v. Cox*, 19 Ohio St. 502; *Leith v. Leith*, 39 N. H. 20; *Hoffman v. Hoffman*, 46 N. Y. 30; *Prosser v. Warner*, 47 Vt. 667.

In California the court in *Galland v. Galland*, 38 Cal. 265, divided on the question, the majority sustaining the jurisdiction and the minority rejecting it. The case was an application for alimony alone, and the court held, as in Virginia, South Carolina and Kentucky, that equity had jurisdiction to decree it, whether the application is or is not coupled with a prayer for divorce, approving the reasoning of MILLS, J., in *Butler v. Butler*, 4 Litt. 202, and stating that the husband is obliged to support his wife; that as there is no remedy at common law for the husband's violation of this obligation, equity must afford one in this as in all cases where conscience and law acknowledge a right and no remedy. Besides, as equity enforced agreements for separation and separate maintenance, it can do it when he turns her out of doors; and that there is no difference in decreeing alimony under an agreement to separate, and decreeing it when the husband forces his wife to separate: citing *Lasbrook v. Tyler*, 1 Ch. R. 24; *Williams v. Callow*, 2 Vern. 752; *Watkins v. Watkins*, 2 Atk. 97; *Purcell v. Purcell*, 4 H. & M. 507; *Almond v. Almond*, 4 Rand. 662; *Logan v. Logan*, 2 B. Mon.

142; *Prather v. Prather*, 4 Dessaus. 33; *Rhame v. Rhame*, 1 McCord Ch. 197; *Glover v. Glover*, 16 Ala. 446. The dissenting opinion held that equity had no such jurisdiction, because the statute only allows alimony upon and in connection with divorce, hence alimony is dependent upon and incidental or auxiliary to an action pending for divorce, and there is no independent jurisdiction to grant it alone, and, because, on reason and authority English and American courts of equity have no original jurisdiction of this subject, and can only grant alimony as derivative from and incidental to some other original subject of jurisdiction: citing Clancy 549; 2 Bishop, sect. 351; 2 Story Eq., sect. 1422; *Chapman v. Chapman*, 13 Ind. 397; *Shannon v. Shannon*, 2 Gray 285; *Sheafe v. Sheafe*, 4 Fost. 567; *Parsons v. Parsons*, 9 N. H. 309; *Doyle v. Doyle*, 26 Mo. 549. But this court has not gone so far as to decree alimony after a divorce.

It should be kept in view that from the ruling of granting alimony as a separate maintenance, developed the doctrine of granting it as an independent proceeding after divorce, hence, if the premises in the former are not correct the latter doctrine is not correct. In no state is this view presented better than in Kentucky. The courts in this state assumed original equity jurisdiction, (*Lockridge v. Lockridge*, 3 Dana 28; *Boggess v. Boggess*, 4 Id. 307; *Woolbridge v. Lucas*, 7 B. Mon. 49; *Butler v. Butler*, 4 Littell 205; *Rogers v. Rogers*, 15 B. Mon. 364; *Hulett v. Hulett*, 80 Ky. 356), and for a long time confined the doctrine to separate maintenance—that is, to granting alimony as a separate maintenance—leaving the marriage still existing, and afterwards extended it to alimony after a divorce. In *Butler v. Butler*, the court held that equity had jurisdiction, regardless of the statute, to decree alimony, leaving the matrimonial chain untouched, because the husband is bound to support his wife. If he fail, it is a wrong acknowledged at law, but for which the law provides no remedy, and therefore equity must furnish the remedy where law and conscience acknowledge the right but give no remedy for its violation. The contrary doctrine “arose in England for fear of intruding upon the ground occupied by the ecclesiastical courts. These courts were incorporated with and composed a part of their government, and their sentence was as obligatory and as much noticed in their civil courts as the decisions of other courts, and it became necessary to restrain other courts from occupying the same ground. But in this

country there are no such courts or boundaries. The reasons for refusing jurisdiction here have ceased and do not exist." If our chancery courts would not assume such jurisdiction "grievous wrongs might exist without remedies until the legislature interfered, which is against a well-known principle ripened into a maxim." The court in this case reviewed the English cases and deemed them conflicting. But in none of these cases can it be found that the reason for the doctrine was that equity refused jurisdiction because the ecclesiastical courts possessed it. On the contrary, it is distinctly asserted that the reason was that no court had original jurisdiction of this matter alone, but had it as incidental to other subjects of jurisdiction. Subsequently this court, in *Rogers v. Rogers*, applied this rule to alimony after divorce. In that case husband and wife were domiciled in Kentucky, and the husband sued in this domicile for divorce on the ground of abandonment and obtained it. The wife appeared and defended, but did not ask and was not given alimony. Some years thereafter both became residents of Ohio, and the wife commenced in the Ohio court a suit for *divorce and alimony*, alleging fraud in the Kentucky proceedings, to which the husband pleaded the Kentucky divorce as a bar. The Ohio Common Pleas Court held the *divorce* in Kentucky valid, but as that court made no support or provision for the wife, and the propriety of doing so was not adjudicated, a decree for alimony was granted. Suit was brought in Kentucky on this judgment for alimony, to which was pleaded the Kentucky divorce, and also that the Ohio court had no jurisdiction to decree alimony, and hence the judgment upon which the suit was brought is null and void. Upon this question the Kentucky Supreme Court held that the Ohio decree for alimony was valid, because it was not shown that it was void for want of jurisdiction over the subject-matter or the person, or void because it was fraudulently procured, or that the same matter had been previously litigated between the same parties in a court of this state. In explanation of this the court said, "If the Kentucky decree of divorce had the effect of absolving the husband and his estate from all liability no alimony can in this case be allowed. But the right to alimony did not depend upon the granting of the divorce; it depended on various other matters, such as the nature of the cause for divorce, the husband's estate, &c. None of these were presented or considered in that proceeding. After that divorce was granted the wife could

have presented her claim for alimony, which the court would still have the power to decide, notwithstanding a divorce had been granted. It was the decree for divorce which created a cause for the alimony. That the wife failed to present her claim for alimony in the Kentucky divorce proceeding made no difference. That matter was not rendered *res adjudicata* by the failure, and consequently the Ohio court did not undertake to re-try any question involved in the Kentucky proceeding." "If it be conceded that by the wife's failure to claim and obtain a decree for alimony in the divorce proceeding she is precluded from asserting it in another action, this would not make the Ohio decree for alimony invalid. It could only be erroneous, and until reversed, it would have the same effect as any other decree." The grounds upon which this decision is based, and the reasons for it, are not satisfactory, and seem to be in contravention of the current of authority and principle.

The courts of Mississippi have taken both sides of this question. In *Shotwell v. Shotwell*, 1 Smedes & Marshall, ch. 51, decided in 1843, the Circuit Court, on the wife's application, decreed a divorce. Alimony was not asked, because of the statute limiting jurisdiction of Circuit Courts to \$500. Subsequently the wife sued in the Superior Court of Chancery for alimony alone, alleging the previous proceedings in and the decree of the Circuit Court. The husband demurred on the ground, that upon principle and under the statute, alimony is incident to and dependent upon the decree of divorce, and as no decree for alimony was made in that proceeding a separate bill therefor cannot be maintained. The statute provided that, *when* divorce is granted the court may grant such alimony as is just and proper. The court overruled the demurrer, stating that whilst it is usual to make the decree for alimony concurrent with the divorce or in the same proceeding, yet the omission cannot affect the wife's right to seek alimony at a subsequent time, by a separate and distinct proceeding and in another court of competent jurisdiction; that alimony is a separate and distinct right resulting from a decree of divorce, but not identical with it, nor necessarily constituting one proceeding. "I am of opinion (said the court) that a separate suit may be maintained for alimony after a decree for a divorce in which such claim was omitted, if there was no express act of the wife waiving her right thereto. If, therefore, a separate bill can be maintained, I can see no reason why it may

not be brought in any court having jurisdiction without regard to the court which granted the divorce, there is nothing in the nature of the proceedings which would limit it to the latter court; because "the wife's right to alimony proceeds upon the moral and legal obligation of the husband to furnish her with a competent support, and does not depend upon the point of time at which she attempts to assert it. The right is founded in the very nature and legal incidents of the marriage contract, hence it is if the husband, by cruelty or misconduct, compels the wife to force herself from him, the courts will enforce this obligation by compelling him to set apart a portion of his estate for her support."

This decision was reversed by the Court of Errors and Appeals (*Lawson v. Shotwell*, 27 Miss. 630 (1854)), the court stating that, "the authorities, almost without exception, agree that alimony is allowed only as an incident to some other proceedings which may be legally instituted by the wife against the husband, such, for instance, as an action for the restitution of conjugal rights, divorce, &c." But, said the court, "we do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained for alimony, but only that the present bill shows no sufficient reason for not taking or asking for alimony in the Circuit Court. A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented." This last statement was made in consequence of misconstruing the jurisdiction of the Circuit Court, intimating that if the plaintiff had not purposely omitted the application for alimony in the divorce proceeding, another construction might be made. This was followed by *Bankston v. Bankston*, 27 Miss. 692, affirming the doctrine that chancery had no original jurisdiction, holding that the court decreeing the divorce had the only power, and as it did not decree final alimony a separate suit for alimony was not maintainable. And this appears to be consistent with the Mississippi statute (Code sect. 1159), providing that *when* the divorce is decreed, the court shall then make the orders concerning alimony.

The Pennsylvania courts (*McKarracher v. McKarracher*, 3 Yeates 56), held the reverse of *Lawson v. Shotwell*, holding that the failure of the wife to claim alimony in the proceedings for divorce was no bar to a further application for that purpose.

In South Carolina (*Jelineau v. Jelineau*, 2 Dessaussure 45; *Prather v. Prather*, 4 Id. 33; *Threewits v. Threewits*, Id. 560; *Prince v. Prince*, 1 Rich. Eq. 282) the courts exercise the jurisdiction to grant a separate maintenance but term it alimony. The decisions have not gone so far as to decree alimony after a divorce *a vinculo*, probably because divorces of this character are unknown there, yet the decisions granting separate maintenance intimate that the same rule would be applicable in all cases. In Tennessee alimony was granted after a legislative divorce: *Richardson v. Wilson*, 8 Yerg. 67. In that case the legislature granted the divorce *a vinculo*, but reserved to the wife all right to alimony if, by law, she should be entitled. The wife filed her petition for alimony, and the court granted it, stating that it had power to take up the question where the legislature left it; that alimony would have been granted if the bill had not contained this reservation; and that the right of the wife to a support from her husband was a constitutional right which the legislature could not take away by a divorce bill, passed *ex parte* and without notice to her. This case decided the point that alimony would be allowed after a legislative divorce with a reservation as to alimony. The balance was dictum. This case can be supported on two grounds: 1st, that the reservation in the act is the same as a reservation in a decree of divorce, and the granting of the alimony, in such case is allowing it in the same proceeding; 2d, that the husband's *ex parte* divorce cannot destroy the wife's right to alimony, because it would be perpetrating a fraud, and because such decrees are not jurisdictional under the laws giving credit to foreign decrees: *Prosser v. Warner*, 47 Vt. 667; *Hoffman v. Hoffman*, 46 N. Y. 30; *Shannon v. Shannon*, 4 Allen 134; *Smith v. Smith*, 13 Gray 209; *Leith v. Leith*, 39 N. H. 20.

In Ohio (*Cooper v. Cooper*, 7 Ohio, 2 pt. 594; *Mansfield v. McIntyre*, 10 Ohio 30; *Cox v. Cox*, 19 Ohio St. 502; 20 Id. 439,) the question has not been settled. In the latest case, *Cox v. Cox*, the husband and wife were domiciled in Ohio. The husband deserted his wife, went to Indiana and obtained a divorce. Some time after the desertion the wife applied in the place of her domicile, Ohio, for divorce and alimony. The husband pleaded the Indiana divorce as a bar. On appeal the court held that the domicile of the wife remained unaffected by the desertion of the husband, and that the Indiana decree of divorce was no de-

fence to her petition for alimony. The court followed *Richardson v. Wilson*, *Crane v. Meginnis* and *Shotwell v. Shotwell*; but as heretofore discussed none of these support it. This case held that jurisdiction of divorce is based on the domicile of the applicant, not on the place of the marriage, nor the place of the offence, nor the domicile of the defendant, because marriage is a social status, and the state in which the applicant resides has the jurisdiction to terminate this status *ex parte*, but nothing else, which decree public policy requires to be elsewhere recognised, hence such decree is not a bar to a proceeding for alimony in a court of another jurisdiction. This case is in harmony with the doctrine herein discussed applicable to the effect of *ex parte* divorce in a foreign jurisdiction, but is not, perhaps, authority on the question whether alimony is incidental to divorce.

We come now to the decisions holding the other side of this question. In England, since the Divorce Act, 20 & 21 Vict., sect. 32, the courts have held in conformity with the history of the subject, and on the principle involved, that permanent alimony is the creature of the Divorce Act, and cannot be allowed but in the same proceedings granting the divorce: *Winscome v. Winscome*, 3 Swabey & Tristram R. 380.

In Arkansas the courts hold that alimony is incident to a divorce, and cannot be granted in an independent proceeding unless the statute expressly so provides. In *Bowman v. Worthington*, 24 Ark. 529, the facts were: The marriage took place in Kentucky. Husband and wife then moved to Arkansas. Wife left her husband on account of alleged adultery, went to Kentucky, obtained a legislative divorce *ex parte*, and then commenced suit in the Arkansas court for alimony. The demurrer to this application was sustained. The court said that alimony is an incident of the divorce, grantable in connection with it, and there is no jurisdiction to entertain a separate application therefor. In this case the court reviews many of the authorities, and holds that this is the only correct position to be taken, and that *Shotwell v. Shotwell*, in Mississippi, was overruled, and *Richardson v. Wilson* is contrary to the weight of authority. The statute (ch. 59) in this state is substantially like the statutes in most of the states, and provides that, "when a decree of divorce shall be entered" the court shall provide for the alimony.

The Georgia courts adopted the same principle, and in explana-

tion of it, after reviewing the cases said, in *McGee v. McGee*, 10 Ga. 477, followed in *Goss v. Goss*, 29 Ga. 109, that no court has original jurisdiction to grant separate maintenance (alimony) whilst the marriage exists. It is incidental to some other power having jurisdiction to decree specific performance. Chancery can decree a separate maintenance on an agreement for that purpose, and can do it in other matters of which it has jurisdiction, such as *supplicavit* for surety of the peace. But equity has no power to decree alimony alone, on the ground of desertion, cruel treatment, failure to maintain the wife, &c. Alimony is incident to divorce, to be obtained in the same proceeding, and not after the divorce in an independent proceeding.

In *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, the wife obtained a decree of divorce *a vinculo*, and allowance of alimony in Kentucky. Subsequently she commenced proceedings in Indiana for additional alimony, alleging the inadequacy of the amount granted in Kentucky. The court said that alimony "is incidental to divorce, the court that decrees the divorce is to make the provision, and if that court fails to provide for the wife by a division of the property or makes an inadequate division, we know of no authority, either from the act of the assembly (of Indiana) or the English books, for any other court to remedy the evil or extend the provision," because there is no precedent except a few extreme cases, the weight of authority being the other way, the Kentucky court could have decreed the necessary maintenance, and because alimony is an incident of a divorce; hence, "when a matter is adjudicated by a court of competent jurisdiction it is forever at rest, not only what was actually determined, but every other matter which the parties might have litigated in the cause." Hence, in divorce proceedings the matter to be litigated is "the separate maintenance (alimony), the wife's condition in life, the fortune she brought in marriage, and her husband's circumstances." These were the subjects of the litigation in Kentucky, and as that court had ample power to do justice between the parties but failed to do it, no other court can supply the deficiency. This was a case of inadequate alimony.

In *Muckenburg v. Holler*, 29 Ind. 139, the court stated that "alimony is an incident of a suit for divorce, and is not a matter which can constitute the subject of an independent suit. It must be adjudged in the divorce proceeding or not at all. All questions

of property are litigated in a suit for divorce, and must there be settled. The complaint here shows that the parties have been divorced, and the legal inference is that the subject-matter of the suit was there settled and put at rest." This is the doctrine in this state: *Moon v. Baum*, 58 Ind. 194; *Middleworth v. McDowell*, 49 Id. 386. In *Middleworth v. McDowell* the wife obtained divorce and alimony in Iowa. Constructive service on the husband, who did not appear and who was not a resident of Iowa. Subsequently she commenced suit in Indiana for the alimony so decreed in Iowa. The court held the decree for alimony of no force in Indiana, because a personal judgment for money cannot be made against a non-resident founded on publication. Following *Beard v. Beard*, 21 Ind. 321; *Lytle v. Lytle*, 48 Id. 200; *D'Arcy v. Ketchum*, 11 How. (U. S.) 165; *Board of Pub. Works v. Columbia College*, 17 Wall. 521.

This doctrine is followed in Illinois: *Chestnut v. Chestnut*, 77 Ill. 346. In Iowa the courts are on both sides of this question. In *Blythe v. Blythe*, 25 Iowa 266, the wife obtained a divorce, but did not ask and did not receive alimony in the divorce proceeding. To an application for alimony alone, the court said that no alimony can be allowed. "The relation of husband and wife must exist either *de jure* or *de facto* in order to justify an order for alimony." In *Harshberger v. Harshberger*, 26 Iowa 503; (*Cole v. Cole*, 23 Id. 433; *McEwen v. McEwen*, 26 Id. 375), the court said, "no independent action for alimony can be brought, it must be connected with and follow a divorce." But in *Graves v. Graves*, 36 Iowa 310 (14 Am. R. 525), a different view was taken, holding that a court of equity has jurisdiction to entertain a suit for and to grant alimony where no divorce or other relief is sought, because the husband is bound to support his wife, hence, if he makes it unsafe or immoral for his wife to remain with him, or he forces her to leave, she carries his credit for support, and those who furnish necessaries can sue at law; second, equity, can take jurisdiction on the ground of avoiding multiplicity of suits, or on the ground that there is no adequate remedy at law; third, on well-settled equity principles as well as upon considerations of public policy. Citing *Jones v. Jones*, 19 Iowa; *O'Hagan v. O'Hagan*, 4 Id. 509; *McMullen v. McMullen*, 10 Id. 412; *Galland v. Galland*, 38 Cal. 265.

The doctrine heretofore stated that alimony is an incident of

divorce and not the subject-matter of an independent proceeding, is adopted in Maine (*Jones v. Jones*, 18 Me. 311; *Henderson v. Henderson*, 64 Id. 419; *Littlefield v. Paul*, 69 Id. 538), and in Massachusetts (*Shannon v. Shannon*, 2 Gray 287; *Baldwin v. Baldwin*, 6 Id. 342; *Coffin v. Dunham*, 8 Cush. 405), and in Michigan (*Peltier v. Peltier*, Har. Ch. 19; *Perkins v. Perkins*, 16 Mich. 167; *Wright v. Wright*, 24 Id. 180.) In *Peltier v. Peltier* the court said: "I am satisfied that exclusive of any statutory provision, chancery has no jurisdiction to entertain an application for alimony alone. The whole current of authority goes to show that courts of chancery have never entertained jurisdiction in cases of this kind, except in aid of some other court or to carry into effect a marriage contract, or in execution of a trust." Citing *Head v. Head*, 3 Atk. 551; *Watkins v. Watkins*, 2 Id. 98; Fonbl. Eq. 98; *Codd v. Codd*, 2 Johns. Ch. 141; *Lewis v. Lewis*, 3 Id. 519; *Mix v. Mix*, 1 Id. 108; *Bullock v. Menzies*, 4 Ves. Jr. 799; *Legard v. Johnson*, 3 Id. 351. The same doctrine is followed in Missouri: *Doyle v. Doyle*, 26 Mo. 545, 549; *Simpson v. Simpson*, 31 Id. 24. In *Doyle v. Doyle* the court said: "A court has no authority to grant alimony but as an incident to a divorce, except where it is conferred by statute. Our statute allows alimony where the husband, without just cause, abandons his wife. Without such a statute the courts cannot grant alimony but as an incident to a divorce."

The same principle is adopted in New Hampshire (*Parsons v. Parsons*, 9 N. H. 317; *Sheafe v. Sheafe*, 24 Id. 569), and in New Jersey (*Kerrigan v. Kerrigan*, 2 McCart. 146; *Nichols v. Nichols*, 10 C. E. Green 60; *Yule v. Yule*, 2 Stock. 138; *Rockwell v. Morgan*, 2 Beas. 119; *Anshutz v. Anshutz*, 1 C. E. Green 162; *Cory v. Cory*, 3 Stock. 400), and also in New York (*Atwater v. Atwater*, 53 Barb. 621; *Codd v. Codd*, 2 Johns. Ch. 141; *Lewis v. Lewis*, 3 Id. 519; *Mix v. Mix*, 1 Id. 108; *Perry v. Perry*, 2 Paige 501), and in Vermont (*Harrington v. Harrington*, 10 Vt. 505; *Prosser v. Warner*, 47 Id. 667). In *Hoffman v. Hoffman*, 46 N. Y. 30, the husband and wife were residents of and domiciled in New York; the husband left the domicile, went to Indiana and obtained a divorce, the service being by publication. The wife had no knowledge of and did not appear in the proceeding. Subsequently the wife sued in New York (the place of the domicile and place where the cause for divorce was committed) for divorce

and alimony, to which was pleaded the Indiana divorce as a bar. The court held that it was *not* a bar, because the Indiana court had no jurisdiction, as the husband was a resident of New York, and went only to Indiana to get the divorce, and because the wife was not served with process or appeared. The judgment was obtained by fraud and obtained *ex parte*. This case was really decided on the doctrine of the effect of an *ex parte* judgment.

In *Prosser v. Warner*, 47 Vt. 667, the husband and wife were domiciled in Vermont. The husband abandoned the wife. She thereupon returned to New York, the place of the marriage, and obtained a divorce and alimony by *ex parte* proceedings, for adultery of the husband in Vermont. Upon this judgment for alimony she commenced an action for debt in Vermont. The court held that this New York decree was not binding in Vermont. The decree was not obtained at the place of the domicile nor the place of the offence. Although these, and some other cases heretofore mentioned, were applications for alimony alone, the decisions were based on the doctrine of *the effect of an ex parte decree*, and not on the principle that alimony is an incident of a divorce, hence this is a connecting question with the one under discussion.

This appears to be the state of the decisions upon this question.

Alimony either is or is not incident to a divorce. If it is, it must be obtained in the divorce proceeding, because the substantive carries with it all its incidents. If this is true, a decree for alimony will be valid if the decree for divorce is valid; hence, if an *ex parte* decree for divorce is valid, an *ex parte* decree for alimony in the same proceeding should also be valid. On the other hand, if alimony is not incident to divorce it should be a substantive matter of jurisdiction like any claim or demand for money. But whilst the authorities hold that alimony is incident to divorce, they also hold that an *ex parte* decree for alimony is not valid. Either one or the other of these positions is incorrect, or there must be a principle upon which both can be reconciled. Perhaps this apparent conflict can be reconciled if it can be established that marriage is a status, and that an *ex parte* divorce only acts upon and dissolves this status. If so, it is a separate and distinct subject-matter from the matter of alimony. Here another question enters, namely, will the dissolution of this status in one state have the effect of dissolving it in another state, and can such a divorce carry alimony with it. If it is a status it must be a something—a substan-

tive subject-matter of jurisdiction—and if it is, why should not the act of dissolving it be recognised in a foreign jurisdiction; hence it is that two other questions are involved, namely, whether or not marriage is a status; and secondly, the effect of an *ex parte* decree of divorce; because if alimony is an incident of a divorce, and only grantable in the divorce proceeding, it should be allowed in an *ex parte* divorce proceeding, if such proceeding is valid, and it will be valid if marriage is a status and that status is a jurisdictional subject-matter. And if it is not valid, if granted in an *ex parte* divorce proceeding, it cannot be said to be incident to a divorce. Or, in other words, alimony is incident to a divorce if it can be granted in a valid *ex parte* divorce, and it is not incident if it cannot be so granted.

Perhaps the solution is that marriage is a status, hence an *ex parte* divorce is valid because it acts upon this status. Alimony cannot be decreed *ex parte*, because it is different from the thing “status,” and there is no jurisdiction to decree *in personam* in *ex parte* proceedings; hence it can be decreed after an *ex parte* divorce or else there would be a failure of justice. Alimony cannot be decreed after a divorce *inter partes*, because the court then has jurisdiction of the *status* and the *person*, and hence all matters involved, or could have been involved, must be adjudicated. The questions, whether or not marriage is a status, and the validity and effect of an *ex parte* divorce, are connected with this doctrine of domicile.

JNO. F. KELLY.

Bellaire, Ohio.

RECENT ENGLISH DECISIONS.

House of Lords.

JOHN WESTON FOAKES v. JULIA BEER.

An agreement between judgment debtor and creditor that, in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor, or his nominee, the residue by instalments the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest upon the judgment.

Pinnel's Case, 5 Rep. 117 a., and *Cumber v. Wane*, 1 Str. 426, followed.

An agreement not to take proceedings if the debtor shall pay certain specified instalments “until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid,” the said sum being the principal alone without interest, gives the creditor no right to interest if the condition as to payment of instalments is fulfilled.

APPEAL from an order of the Court of Appeal.

On the 11th of August 1875, the respondent recovered judgment against the appellant for 2077*l.* 17*s.* 2*d.* for debt, and 13*l.* 1*s.* 10*d.* for costs. On the 21st of December 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms:

"Whereas, the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice, Exchequer Division, for the sum of 2090*l.* 19*s.* And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions: Now this agreement witnesseth, that in consideration of the said John Weston Foakes paying to the said Julia Beer, on the signing of this agreement, the sum of 500*l.*, the receipt whereof she doth hereby acknowledge, in part satisfaction of the said judgment debt of 2090*l.* 19*s.*, and on condition of his paying to her or her executors, administrators, assigns or nominees the sum of 150*l.*, on the 1st day of July and the 1st day of January, or within one calendar month after each of the said days respectively in every year, until the whole of the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied; the first of such payments to be made on the 1st day of July next, then she, the said Julia Beer, hereby undertakes and agrees that she, her executors, administrators or assigns will not take any proceedings whatever on the said judgment."

The respondent having in June 1882 taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent, as plaintiff, and the appellant, as defendant, whether any and what amount was, on the 1st of July 1882, due upon the judgment.

At the trial of the issue before CAVE, J., it was proved that the whole sum of 2090*l.* 19*s.* had been paid by instalments, but the respondent claimed interest. The jury, under his lordship's direction, found that the appellant had paid all the sums which, by the agreement of the 21st of December 1876, he undertook to pay, and within the times therein specified. CAVE, J., was of opinion that, whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (WATKIN WILLIAMS and MATHEW,

JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (BRETT, M. R., LINDLEY and FRY, L. JJ.) reversed that decision and entered judgment for the respondent for the interest due with costs.

W. H. Holl, Q. C., for appellant.

Bompas, Q. C., for respondent.

EARL OF SELBORNE, L. C.—My Lords, upon the construction of the agreement of the 21st of December 1876, I cannot differ from the conclusion in which both the courts below were agreed. If the operative part could properly be controlled by the recitals, I think there would be much reason to say that the only thing contemplated by the recitals was giving time for payment, without any relinquishment, on the part of the judgment creditor, of any portion of the amount recoverable (whether for principal or for interest) under the judgment. But the agreement of the judgment creditor, which follows the recital, is that she “will not take any proceedings whatever on the judgment” if a certain condition is fulfilled. What is that condition? Payment of the sum of 150*l.* in every half year, “until the whole of the said sum of 2090*l.* 19*s.*” (the aggregate amount of the principal debt and costs, for which judgment had been entered) “shall have been fully paid and satisfied.” A particular “sum” is here mentioned, which does not include the interest then due or future interest. Whatever was meant to be payable at all, under this agreement, was clearly to be payable by half-yearly instalments of 150*l.* each; any other construction must necessarily make the conditional promise nugatory. But to say that the half-yearly payments were to continue till the whole sum of 2090*l.* 19*s.*, “and interest thereon,” should have been fully paid and satisfied, would be to introduce very important words into the agreement, which are not there, and of which I cannot say that they are necessarily implied. Although, therefore, I may (as indeed I do) very much doubt whether the effect of the agreement, as a conditional waiver of the interest to which she was by law entitled under the judgment, was really present to the mind of the judgment creditor, still I cannot deny that it might have that effect, if capable of being legally enforced.

But the question remains, whether the agreement is capable of

being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed except a present payment of 500*l.*, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of 150*l.* each, at the times therein mentioned; much less did he give any new security, in the shape of negotiable paper, or in any other form. The promise *de futuro* was only that of the respondent, that if the half-yearly payments of 150*l.* each were regularly paid, she would "take no proceedings whatever on the judgment." No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not, in my opinion, be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the 500*l.*, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your lordships are now prepared, not only to overrule as contrary to law, the doctrine stated by Sir EDWARD COKE to have been laid down by all the judges of the Common Pleas, in *Pinnel's Case* in 1602, and repeated in his note to Littleton, sect. 344; but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regu-

larly made; the case not being one of a composition with a common debtor, agreed to, *inter se*, by several creditors. I prefer so to state the question instead of treating it (as put at the bar) as depending on the authority of *Cumber v. Wane*, 1 Str. 426, decided in 1718. It may well be that distinctions, which in later cases have been held sufficient to exclude the application of that doctrine, existed and were improperly disregarded in *Cumber v. Wane*; and yet that the doctrine itself may be law, rightly recognised in *Cumber v. Wane*, and not really contradicted by any later authorities. And this appears to me to be the true state of the case. The doctrine itself, as laid down by Sir EDWARD COKE, may have been criticised as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary, I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your lordships would do right, if you were now to reverse as erroneous a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for two hundred and eighty years.

The doctrine, as stated in *Pinnel's Case* is "that payment of a lesser sum on the day" (it would of course be the same after the day), "in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." As stated in Coke Littleton 212, it is, "where the condition is for payment of 20*l.* the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater;" adding (what is beyond controversy), that an acquittance under seal, in full satisfaction of the whole, would (under like circumstances) be valid and binding.

The distinction between the effect of a deed under seal, and that of an agreement by parol, or by writing not under seal may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as in the actual state of the law, I think it is), whether consideration is or is not given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after

certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor. All the authorities subsequent to the case of *Cumber v. Wane*, 1 Str. 246, which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp*, 15 M. & W. 23; *Curlewis v. Clark*, 3 Ex. 375, and *Goddard v. O'Brien*, 9 Q. B. Div. 37), have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships. What is called "any benefit, or even any legal possibility of benefit," in Mr. Smith's notes to *Cumber v. Wane*, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal.

My conclusion is, that the order appealed from should be affirmed, and the appeal dismissed, with costs, and I so move your Lordships.

LORD BLACKBURN.—My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on the 21st of December 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down

of 500*l.*, and payment within a month after the 1st day of July and the 1st day of January in each ensuing year of 150*l.* until the sum of 2090*l.* 19*s.* was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of 150*l.* there should be a further payment of 90*l.* 19*s.* made within the next six months. This is the construction which all three courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on these conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of 500*l.*, and punctual payment at the rate of 300*l.* a year till 2090*l.* 19*s.* was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words, "till the said sum of 2090*l.* 19*s.* shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking 500*l.* in satisfaction of the whole 2090*l.* 19*s.*, subject

to the condition that unless the balance of the principal debt was paid by instalments, the whole might be enforced with interest. If, instead of 500*l.* in money, it had been a horse valued at 500*l.*, or a promissory note for 500*l.*, the authorities are that it would have been a good satisfaction; but it is said to be otherwise, as it was money. This is a question, I think, of difficulty.

In Coke Littleton 212 b., Lord COKE says: "Where the condition is for payment of 20*l.*, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. * * If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case*. That was an action on a bond for 16*l.*, conditioned for the payment of 8*l.* 10*s.*, on the 11th of November 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff 5*l.* 2*s.* 2*d.*, which the plaintiff accepted in full satisfaction of the 8*l.* 10*s.* The plaintiff had judgment for the insufficient pleading. But though this was so, Lord COKE reports that it was resolved by the whole Court of Common Pleas, "that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, &c., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so, if I am bound in 20*l.* to pay you 10*l.* at Westminster, and you request me to pay you 5*l.* at the day at York, and you will accept in full satisfaction for the whole 10*l.*, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain, might by any possibility be more beneficial to the creditor than his debt, the court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction, it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord COKE deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake; and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in *Fitch v. Sutton*, 5 East 230, as to which I shall make some remarks later; and in *Down v. Hatcher*, 10 A. & E. 121, as to which PARKE, B., in *Cooper v. Parker*, 15 C. B. 828, said: "Whenever the question may arise as to whether *Down v. Hatcher* is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case*, 5 Rep. 117 a., as good law.

For instance, in *Sibree v. Tripp*, 15 M. & W. 33, PARKE, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And ALDERSON, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two; viz., payment of part, and an agreement without consideration to give up the residue. The court might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a court of the first

instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this house, I did think it open in your lordship's house to reconsider this question. And, notwithstanding the very high authority of Lord COKE, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And, if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and, if the case was not defended, get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur, he made this sure. Strangely enough, it seems long to have been thought that if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way by a sham plea,—that a chattel was given and accepted in satisfaction of the debt. The recognised forms were giving and accepting in satisfaction a beaver hat (*Young v. Rudd*, 5 Mod. 86), or a pipe of wine. All this is now antiquated. But whilst it continued to be the practice, the plea founded on the first part of the resolution in *Pinnel's Case* were very common, and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted, it was a good satisfaction. But special pleas, founded on the other resolution in *Pinnel's Case*, on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum, the defendant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might, perhaps, as suggested by HOLROYD, J., in *Thomas v. Heathorn*, 2 B. & C. 482, find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a God's-penny. This, however, seems to me to be an

unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this house.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand, from *Pinnel's Case* down to *Cumber v. Wane*, 5 Geo. I., a period of one hundred and fifteen years.

In *Adams v. Tapling*, 4 Mod. 88, where the plea was bad for many other reasons, it is reported to have been said by the court, that: "In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt, this was one of the cases which PARKE, B., would have cited in support of his opinion, that *Down v. Hatcher* was not good law. The court are said to have gone on to recognise the dictum in *Pinnel's Case*, or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in *Cumber v. Wane* really were. I have obtained the record. The plea is, that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber, that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam 'a promissory note,' manu propria ipsius Georgii subscript pr. solucon eidem Edwardo Cumber vel ordini quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that, "the said George did not give to him, Edward, any note in writing called a promissory note, with the hand of him, George, subscribed for the payment to him, Edward, or his order of 5*l.*, fourteen days after date, in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment in the Common Pleas for the plaintiff "that the replication was good in law."

The Reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence, namely, the giving in satisfaction: *Young v. Rudd*, 5 Mod. 86, and certainly that was not immaterial. But for some reason, I do not stop to inquire what, PRATT, C. J., prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And, therefore, this case is in direct conflict with *Sibree v. Tripp*.

Two cases require to be carefully considered. The first is *Heathcote v. Crookshanks*, 2 T. R. 24. The plea there pleaded would, I think, now be held perfectly good, see *Norman v. Thompson*, 4 Ex. 755; but BULLER, J., seems to have thought otherwise. He says, "thirdly, it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a nudum pactum, unless they had afterwards accepted it. In the case in which *Cumber v. Wane* was denied to be law (*Hardcastle v. Howard*, 26 Geo. III., B. R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that BULLER, J., meant by saying "that is a nudum pactum, unless they had afterwards accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In *Fitch v. Sutton*, 5 East 230, not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in *Steinman v. Magnus*, 11 East 390, it was pretty well admitted by Lord ELLENBOROUGH, that the decision in *Fitch v. Sutton* would have been the other way, if they had understood the evidence as the Reporter did. But though this misapprehension of the judges as

to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of *Fitch v. Sutton*, still it remains that Lord ELLENBOROUGH, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say, "It is impossible to contend that acceptance of 17l. 10s. is an extinguishment of a debt of 50l. There must be some consideration for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane*, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in *Heathcote v. Crookshanks*, to have been denied to be law, and in confirmation of that, BULLER, J., afterwards referred to a case, stated to be that of *Hardcastle v. Howard*, 26 Geo. III., yet I cannot find any case of that sort, and none has been now referred to; on the contrary the decision in *Cumber v. Wane*, is directly supported by the authority of *Pinnel's Case*, which never appears to have been questioned.

I must observe that, whether *Cumber v. Wane* was or was not denied to be law in *Hardcastle v. Howard*, it certainly was denied to be law in *Sibree v. Tripp*, and that, though it is quite true that *Pinnel's Case*, as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before *Fitch v. Sutton*, unless it be *Cumber v. Wane*, has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in *Fitch v. Sutton*, whether the dictum in *Pinnel's Case* was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority, and the adhesion of BAYLEY, J., to it in *Thomas v. Heathorn*, that Barons PARKE and ALDERSON expressed themselves as they did in the passages I have cited from *Sibree v. Tripp*. And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber v. Wane*, in the second edition of his *Leading Cases*, that, "a liquidated and undisputed money demand, of which the day of pay-

ment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord COKE made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this house to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned lords who heard the case, I do not repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Appeal dismissed with costs.

Concurring opinions were delivered by Lords WATSON and FITZGERALD.¹

¹ See note to *Goddard v. O'Brien*, 21 Am. Law Reg. (N. S.) 639.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

DODD v. JONES.

A contract to assign an insurance policy to the purchaser of the insured property is a contract of sale, and the measure of damages for breach thereof is only that amount necessary to procure a policy for the remainder of the time it had to run, not the value of the house, which burned down while the promisee relied upon the fulfilment of the contract and neglected to insure.

ACTION of contract to recover for the non-assignment of a certain fire insurance policy. The facts appear in the opinion. At the trial below the verdict was for plaintiff in the sum of \$5.94, the

amount it would have cost to procure insurance for the unexpired term of the policy. Plaintiff excepted.

A. L. Murray and D. F. Kimball, for plaintiff.

E. C. Gilman, for defendant.

The opinion of the court was delivered by

ALLEN, J.—The defendant sold a house to the plaintiff, and agreed to assign to her a policy of insurance he held upon it. He did not assign it, although several times requested by the plaintiff, but promised to do so, and gave some excuse for not having done it. The plaintiff procured no insurance upon the house. Nearly six months after the conveyance of the house to the plaintiff, and about three weeks after the last demand upon the defendant for an assignment, the house was injured by fire.

The plaintiff declares in contract upon the agreement to assign the policy, alleging that it became void by reason of the neglect of the defendant to perform his agreement, and that the plaintiff was deprived of the benefit of the insurance, and seeks to recover the amount that might have been recovered upon the policy for the loss by fire. At the trial the court held that the plaintiff could not recover for damages resulting from the burning of the house, nor for other damages more than it would have cost to procure insurance for the unexpired term of the policy. The instructions given were clearly correct.

The agreement was not a contract of insurance but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequences of the failure of the defendant to perform his contract would be that the plaintiff would procure another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that: *Loker v. Damon*, 17 Pick. 284; *Miller v. Mariners' Church*, 7 Greenl.

51; *Grindle v. Eastern Express Co.*, 67 Me. 317; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304.

Exceptions overruled.

There is a broad distinction between the measure of damages for a tort and for breach of contract. "The wrongdoer," says Judge SUTHERLAND, (1 Damages 74), "is answerable for all the injurious consequences of his tortious act, which according to the usual course of events and the general experience, were likely to ensue, and which therefore when the act was committed he may reasonably be supposed to have foreseen and anticipated. But for breaches of contract the parties are not chargeable with damages on this principle. Whatever foresight at the time of a breach the defaulting party may have, of the probable consequences, he is not generally held for that reason to any greater responsibility; he is liable only for the direct consequences of the breach; such as usually occur from the breach of such a contract, and such as were within the contemplation of the parties when the contract was entered into, as likely to result from a breach:" *Hadley v. Baxendale*, 9 Exch. 341; *Candee v. Western U. Tel. Co.*, 34 Wis. 479.

Thus on failure to give a lease and possession in accordance therewith as agreed, held, that damages could not be recovered for injuries to goods packed up and stored to await possession, nor for profits lost while they were so packed and withheld from exposure for sale. This was on the ground that the breach did not necessarily prevent a sale or result in injury by storage in an improper place: *Lowenstein v. Chappell*, 30 Barb. 421. See also *Horner v. Wood*, 15 Barb. 371; *Cuddy v. Major*, 12 Mich. 368; *Masterton v. Mayor*, 7 Hill. 61; *Story v. N. Y. Railroad Co.*, 6 N. Y. 85; *Bridges v. Stickney*, 38 Me. 361; *Barnard v. Poor*, 21 Pick. 378; *Fox v. Harding*, 7 Cush. 516; *Clare v. May-*

nard, 6 Ad. & El. 519; *Walker v. Moore*, 10 B. & C. 416; *Lawrence v. Wardwell*, 6 Barb. 423; *Williams v. Reynolds*, 6 B. & S. 493; *Harper v. Müller*, 27 Ind. 277; *Walsh v. Chicago, &c., Railroad Co.*, 42 Wis. 23; *Brown v. C., M. & St. P. Railroad Co.*, Wis. L. News, Feb. 2, 1882; *Griffin v. Collier*, 16 N. Y. 489; *Akder v. Keighley*, 15 M. & W. 117; *Hammer v. Schoenfelder*, 47 Wis. 455; *Messmore v. N. Y. S. & L. Co.*, 40 N. Y. 422.

But while one who breaks a contract is not liable for remote or speculative damages, although susceptible of proof, or deducible from his non-performance, he is liable for damages directly resulting from his breach, and which may be contemplated or presumed likely to result therefrom: *Miller v. Mariners' Church*, 7 Me. 51; *True v. International Tel. Co.*, 60 Me. 9, 25; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209. Thus where in consequence of the unreasonable delay of a carrier in delivering plaintiff's account against a third person, it became barred by the Statute of Limitations, the carrier was held liable for the amount of the account: *Favor v. Philbrick*, 5 N. H. 358. Where an express company received from plaintiff a promissory note against a third person which they agreed to collect of the maker, but during the company's negligent delay in pressing the collection, the maker failed and the note became worthless, the company were held for the amount of the note: *Knapp v. U. S. & C. Ex. Co.*, 55 N. H. 348; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422; *Bryant v. Am. Tel. Co.*, 1 Daly 575. And while the loss of another's money received for transportation by a carrier, without reasonable knowledge of the purpose for which it is sent will lay the carrier under obligation

merely to refund the principal sum with interest; still when it is seasonably sent for the specific purpose of paying the sender's premium on his life policy which will lapse if the money be not paid at the particular time and the carrier is reasonably informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will justly hold him primarily at least for the net value of the policy which lapsed in consequence of his negligence. From their knowledge of the special circumstances both parties must be presumed to have contemplated such consequences when the money was deposited with the carrier: *Grindell v. Eastern Ex. Co.*, 67 Me. 317. But this rule is limited by another. The law makes it incumbent upon a person for whose injury another is responsible, to use ordinary care and take all reasonable measures within his knowledge and power, to avoid the loss and render the consequences as light as may be. It will not permit him to recover for losses that such care and means might have prevented: *Loker v. Dannon*, 17 Pick. 284; *French v. Vining*, 102 Mass. 132; *Eastman v. Sanborn*, 3 Allen 594; *Sherman v. Fall River I. Works*, 2 Id. 524; *Scott v. Boston, &c., Steamboat Co.*, 106 Mass. 468; *Sutherland v. Wyer*, 67 Me. 69; *Hamilton v. McPherson*, 28 N. Y. 72, 77; *Milton v. Hudson R. S. Co.*, 37 Id. 210; *Mather v. Butler Co.*, 28 Ia. 253; *Simpson v. Keokuk*, 34 Id. 568.

Now, as suggested in the principal case and the *Grindell Cases*, *supra*, some insurance companies are accustomed to reinstate the assured without expense, in case of accidental lapse, especially when the policy has run but a short time. All of them will re-insure on payment of a premium based on increased age, if, on re-examination, the health of the assured remains unimpaired. It is incumbent on the assured to protect himself from loss by procuring reinstatement or rein-

surance, if he has a reasonable time and opportunity to do so. Of course, should he die so quickly after the lapse of the policy that he had not a reasonable time or opportunity to protect himself from loss by the lapse, then, probably, the person causing the loss would be liable for the full amount of the policy. These views apply, in substance, to fire as well as life insurance.

Perhaps the most interesting application of the rule that a party injured by breach of contract must use reasonable diligence to protect himself from loss, and can only recover damages for such injury as he can not, by the exercise of reasonable diligence, prevent, is to the case of a broker who buys or sells for a customer stocks or grain upon future delivery, and wrongfully closes out the "deal" to the injury of the customer. For example, a broker buys 100,000 bushels of grain to be delivered to him for his customer within sixty days—whenever called for. The customer keeps his margins good, but the broker wrongfully sells him out. Here the broker has been holding for his customer not an insurance policy, but a contract of sale of grain for future delivery. His agreement with his customer is to hold this contract until the time expires or the customer directs him to dispose of it; providing, of course, that ample margins are deposited. He has wrongfully disposed of that contract, to the loss of his customer's possible profits. What is the measure of damages? The amount of the margins? The value of the grain, or the value of the contract to deliver it?

In Illinois a party employed another to purchase a quantity of grain for him and to advance the money for the purpose, and to sell the same as directed, the former depositing with the latter a sum of money to secure him against loss in advancing the means to make the purchase, in case the price of grain should decline before it was sold. The

party making the purchase did not obey instructions in making the sale of the grain, but sold at a loss. It was decided that the money deposited as an indemnity could be recovered under the common counts in assumpsit; it was not necessary to declare on the special contract which had been violated, as nothing remained to be done under it. The party making the purchase having disobeyed instructions in making the sale, he thereby lost his lien upon the money deposited with him as an indemnity against loss: *Jones v. Marks*, 40 Ill. 314. *Oldershaw v. Knowles*, 101 Ill. 117, appears to be to the same effect, while in *Denton v. Jackson*, 106 Ill. 433, it is decided that in case of a wrongful sale by the broker he will be bound to "make good" the purchaser's loss, and "such purchaser may in such case recover of him the full amount deposited as margins." In each of these cases the action appears to have been assumpsit for money had and received, designed simply to recover the margins, without reference to any possible profits that might have resulted had the "deal" been kept open. It is noteworthy, too, that there is no discussion by the court as to what is the proper measure of damages in either of the cases.

Here the measure of damages is the amount of margins put up. But there are several considerations which make this appear somewhat inequitable. For example, suppose the broker, on behalf of the customer, had agreed to buy 100,000 bushels of wheat, to be delivered in three months, and paid for at one dollar per bushel. Suppose that wheat declines to ninety cents in thirty days, thereby necessitating the customer to put up as margins \$10,000, which he does, but is, notwithstanding, "closed out" by his broker. This act of the broker is wrongful, and, according to the foregoing decisions, he is liable to his customer for the \$10,000. But suppose that, throughout the remainder of

the three months, wheat steadily declines until it reaches seventy-five cents per bushel. This decline would have compelled the customer to "put up" \$15,000 more—\$25,000, in all—which would have been lost when the time for delivery expired. In such a case as this, the "wrongful" act of the broker would, instead of producing a loss, really work a benefit—a saving, of \$15,000. Is he, nevertheless, to be mulcted in \$10,000 damages? If a rule of damages is sound, that will produce such a result as this, there would seem to be something of truth in the remark of Mephistopheles, in Faust, that "Reason is nonsense; Right, an impudent suggestion." It may be questioned, too, whether money had and received lies in such a case. Chitty writes thus: "But the count for money had and received is not maintainable, if a contract has been in part performed and the plaintiff has derived some benefit, and by recovering a verdict the parties cannot be placed in the exact situation in which they originally were when the contract was entered into:" 1 Pleadings 355. This proposition of law is sustained by the cases of *Hunt v. Silk*, 5 East 449, and *Beed v. Blandford*, 2 Young & J. 278. Now, in the case supposed, would a judgment for \$10,000—the amount of the margins lost—place the parties in *statu quo*? Clearly it would not; because the broker's contract with his customer to keep the deal open for him has been partly performed. The customer has for thirty days derived the benefit of having control of the property and all possibility of a rise in the market during thirty days' time. The broker would not, by the judgment, be restored to the control of the wheat during the thirty days it was controlled by his customer, nor would any equivalent for the loss of this thirty days' control be given the broker. And if he had had control he could, perhaps, have sold and saved himself from all, or part, at

least, of the loss by the decline. And when the broker "closed out" the "deal" he did not keep the \$10,000 margins. They were paid to the other party to the transaction—the man from whom the wheat was bought. If, now, the broker pays the \$10,000 judgment against him, instead of being left in *status quo*, he will have lost a large sum of money. "By recovering a verdict" for \$10,000 the parties will by no means "be placed in the exact situation in which they originally were when the contract was entered into." How, then, will the action for money had and received lie, according to Chitty's rule in such a case?

Markham v. Jaudon (decided in New York in 1869), 41 N. Y. 235, laid down a different measure of damages. That was a case where the defendants, stock-brokers, at the request of plaintiff, and for him, but in their own names and with their own funds, purchased certain stocks, he depositing with them a "margin" of ten per cent., which was to be "kept good," they "carrying" the stocks for him. It was decided, two judges, GROVER and WOODRUFF, dissenting, that the legal relation created between the parties by this transaction was necessarily that of pledgor and pledgees, the stock purchased being the property of the plaintiff, and in effect pledged to the defendants as security for the repayment of the advances made by them in the purchase; and that a sale of such stock by them except upon judicial proceedings, or after a demand upon him for the repayment of such advanced and commissions, and a reasonable personal notice to him of their intention to make such sale, in case of default in payment, specifying the time and place of sale, is a wrongful conversion by them of the property of the plaintiff. Held, further, that in an action by the plaintiff against defendants for damages on account of such conversion, the proper measure of recovery was

the highest market price between the time of the conversion and the trial (citing *Romaine v. Allen*, 26 N. Y. 309; *Scott v. Rogers*, 31 Id. 676; *Burt v. Dutcher*, 34 Id. 493.) This was treating the broker's conduct in the light of a tort rather than as a mere breach of an implied contract to buy certain stocks and hold them for the benefit of the customer so long as the latter should desire, and keep his "margins" good.

Another case giving what appears to be a sounder view of this subject is *Baker v. Drake*, 53 N. Y. 211. The New York court had in several cases expressed its willingness to re-examine its ruling in *Markham v. Jaudon*, 41 N. Y. 235. In *Mathews v. Coe*, 49 N. Y. 57, Judge CHURCH distinctly said that an unqualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial could not be upheld upon any sound principle of reason or justice, and that the New York court did not regard the rule to be so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

In *Baker v. Drake*, stock was bought by defendants, plaintiff putting up margins to secure them from loss. Defendants sold out plaintiff wrongfully, and the lower court awarded as damages the difference between the price at which the stock was sold, and the highest price at which it could have been sold between the time of the actual sale and the trial. Of this sum the court say: "This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the

subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience." *Baker v. Drake, supra*.

As to what was the proper indemnity the court said: "The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss. If upon becoming informed of the sale he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale. Would there be any justice or reason in permitting him to lie by and charge his broker with the result of a

rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he had been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done." *Baker v. Drake*, 53 N. Y. 217. The court intimated also that this was the proper rule of damages no matter whether the action was on the contract broken or for the tort.

The rule laid down in *Baker v. Drake* appears to be reasonable and right. Should it not be applied in cases like those cited in Illinois where it is sought to recover the margins deposited? Its application to such cases would appear to be sustained by the principle so clearly stated by Field (Law of Damages, 19-20). "It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another, if he can do so by ordinary effort and care, or at a moderate expense, for which effort and expense he may charge the wrongdoer. And where by the use of such means he may prevent loss he can only recover for such loss as could not thus be prevented." And again, p. 131: "The principle applies whether the plaintiff's negligence contributed to the injury, or whether by his subsequent negligence and failure to use reasonable means to prevent the consequences of an injury, the loss is greater than it would otherwise have been. In either case he cannot recover for loss caused by his own fault." Field, Law of Damages, p. 131; see also *Mather v. Butler Co.*, 28 Ia. 253; *Simpson v. City of*

Reed, 34 Id. 253; *Jones v. Van Pat-* Me. 9; *Dobbins v. Duqund*, 65 Ill.
ter, 3 Ind. 107; *Benton v. Fay*, 64 Ill. 464, 467.
 417; *Parsons v. Sutton*, 66 N. Y. 92; ADELBERT HAMILTON.
Tru v. International Tel. Co., 60 Chicago.

Supreme Court of Kansas.

HUMMER ET AL. v. LAMPHEAR.

An action can be maintained on a domestic judgment, although it is in full force and effect, and the time within which an execution can issue has not expired.

ERROR from Jackson County.

Hudson & Tufts, for plaintiff in error.

Martin & Orr, for defendants in error.

HORTON, C. J.—The facts in this case are as follows: On June 17th 1876, the Perpetual Building and Saving Association recovered in the District Court of Atchison county a judgment against John P. and Matilda W. Hummer for the sum of \$331.08, bearing interest at nine per cent. per annum. June 6th 1881, an execution was issued upon this judgment. This was returned wholly unsatisfied as to the building and saving association. On September 13th 1882, the judgment was assigned and transferred to A. H. Lamphear, who is now the owner thereof. On September 28th 1882, an *alias* execution was issued upon the judgment, directed to the sheriff of Jackson county, Kansas, and this execution was also returned unsatisfied. On November 24th 1883, A. H. Lamphear brought his action in the District Court of Jackson county against John P. and Matilda W. Hummer, upon the judgment in favor of the building and saving association of June 17th 1876, and alleged in his petition that the judgment was in full force and effect; that John P. and Matilda W. Hummer had no personal property within the state of Kansas subject to execution, nor the legal title to any lands or real estate in said state subject to execution; that Matilda W. Hummer was the owner of an equitable interest in a quarter section of land lying in Jackson county, state of Kansas, the legal title to which was in the state of Kansas, to secure the sum of \$676.30, with interest from June 17th 1882, at ten per cent. per annum; that upon payment of this amount and interest, the state was ready and willing to give a deed or patent

conveying the land and the legal title thereto. The prayer of the petition was that judgment should be rendered against J. P. and M. W. Hummer for the sum of \$331.08, with interest at nine per cent. per annum, and costs of suit; that the sheriff of Jackson county be appointed a receiver to ascertain the interest of Matilda W. Hummer in the land described in the petition; that he take possession of the same and hold it, with the rents and profits arising therefrom, subject to the order of the court, and for other and further relief as the court might deem meet and proper. The defendants, John P. and Matilda W. Hummer, demurred to the petition upon the grounds: 1st, that the court had no jurisdiction of the persons of the defendants or of the subject of the action; 2d, that the petition did not state facts sufficient to constitute a cause of action against the defendants or either of them. The court overruled the demurrer, and rendered judgment against the defendants for \$546.17, with interest and costs, adjudged the same to be a first and prior lien on whatever interest the defendants or either of them had in the real estate described in the petition, and decreed that if the defendants failed or refused to pay the judgment within a day named, an order of sale issue to sell the property to satisfy the same. To the rulings and judgment of the court the defendants excepted. It is their contention at this time that the petition does not state facts sufficient to constitute a cause of action, because, upon its face, it appears that the judgment sued on was, at the commencement of this suit, in full force and effect, and that execution might have issued thereon, and the equitable interest of Matilda W. Hummer in the real estate in Jackson county have been taken by execution: Code, sects. 419, 443; Comp. Laws 1879, c. 104, sect. 1, subd. 8. To support this, it is insisted that at common law an action could not be maintained upon a judgment until the time within which an execution might issue had elapsed: *Pitzer v. Russel*, 4 Or. 124; *Lee v. Giles*, 1 Bailey 449; 21 Am. Dec. 476; 3 Bl. Com. (Wendell's ed.) 160.

Counsel say in their brief: "There are *dicta* in several decisions which would seem to take a contrary view; but we have been unable to find a case where the question was squarely raised, and the decision was that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual. * * * *Burnes v. Simpson*, 9 Kans. 658, decides that an action can be maintained on a domestic judg-

ment in this state, which is true; but whether it can be maintained when an execution can issue thereon was not raised in that case, and consequently not examined. We claim that case does not decide the question now raised."

The decision in *Burns v. Simpson*, *supra*, goes further than counsel are willing to concede. In that case the judgment was rendered June 4th 1859, for \$3054 and costs. Executions were issued as follows: September 28th 1859; November 28th 1859; January 27th 1860; August 15th 1864; May 2d 1869. All of these were returned unsatisfied. The action on the judgment was commenced June 2d 1869. Under the law in force at the rendition of the judgment of June 4th 1859, judgments of the District Court were liens for five years on lands, and as long thereafter as judgment should be kept alive by the issue of executions in proper time: Comp. Laws 1862, sects. 433, 434. The judgment of *Burns v. Simpson*, of June 4th 1859, was in full force and unsatisfied when the action of June 2d 1869 was instituted, as it had been kept alive by the issue of executions in accordance with the provisions of the statute. Therefore the decision in *Burns v. Simpson*, upon the record in that case, decides, in effect, that an action can be maintained upon a judgment in this state, although the judgment is in full force, and the time within which an execution can be issued has not expired. As counsel have been unable "to find a case where the question was squarely raised, and it was decided that such an action could be maintained at common law until the judgment became dormant, or the execution would prove ineffectual," we refer to the following authorities: "Debt lies upon a judgment within or after the year after the recovery:" Wh. Selw. 444. "By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution:" 1 Com. Dig. 1792, "*Debt*," A 2 (43d ed.), 3, 2, B.

In *Ames v. Hoy*, 12 Cal. 11, it was insisted by counsel "that, as an execution could have been issued on the judgment no action could be sustained thereon; or, in other words, that an action of debt will not lie on a judgment if an execution can be issued thereon." Upon this point, the court, BALDWIN, J., delivering the opinion, said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained; and no better

or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment, in order to save or prolong the lien, and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that the defendant may be vexed by repeated judgments on the same cause of action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In *Greathouse v. Smith*, 4 Ill. (3 Scam.) 541, TREAT, J., delivering the opinion of the court, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment of a court of record. The judgment is a good cause of action, it being, as between the parties, the most conclusive evidence of indebtedness. We know of no principle which inhibits the creditor, on a judgment, which is in force and unsatisfied, from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment or institute a new action on it. Notwithstanding the second suit may be unnecessary, he has the clear legal right to recover, and the courts have no power to prevent him, or impose terms on him for so doing."

In that case, Abraham Lincoln, afterwards president, appeared as one of the counsel.

In *Davidson v. Nebaker*, 21 Ind. 334, it was decided that "a judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, notwithstanding the plaintiff may have a remedy on the judgment, in the court where it was rendered, by execution or otherwise."

In *Hale v. Angel*, 20 Johns. 342, it was held: "Where an execution, issued on a judgment in justice's court, is not returned at all by the constable, the common-law right of the party remains unimpaired, and he may bring an action of debt on the judgment." In the opinion it was said: "There are no negative words that a party shall not sue on a judgment until the execution has been returned. The common-law right of bringing an action of debt *as soon as a judgment is recovered*, remains unimpaired. The statute does not give the action of debt, but is merely explanatory of the common-law right."

In *Smith v. Mumford*, 9 Cow. 26, the case of *Hale v. Angel*, *supra*, was referred to and followed.

In *Linton v. Hurley*, 114 Mass. 76, it was held : " An action may be maintained upon a judgment, although an execution issued thereupon has not been returned ;" and in *O'Neal v. Kittredge*, 85 Mass. (3 Allen) 470, it was decided " that a declaration setting forth the recovery by the plaintiff against the defendant, of a judgment for a certain sum as damages, and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action hath accrued to the plaintiff to have and recover of the defendant the balance due thereon, and interest, is sufficient on demurrer."

Freeman, in his work on Judgments (3d ed.), sect. 432, says : " At common law a party has a right of action upon his judgment as soon as it is recovered. This right is neither barred nor suspended by the issuing of an execution, nor because, from having the right to take out execution, the plaintiff's action seems to be unnecessary."

Many other cases might be cited supporting the same doctrine, but we think, for present purposes, the above sufficient. If the question were a new one in this state, the writer of this would prefer to follow *Lee v. Giles*, 1 Bailey 449, and *Pitzer v. Russel*, 4 Or. 124 ; but the case of *Burns v. Simpson* is decisive. That decision was rendered in 1872, and it is for the legislature to interpose and provide that such oppressive and vexatious actions shall not be brought if the rule of the common law, as interpreted in *Burns v. Simpson*, *supra*, is to be changed.

Finally, it is urged that the judgment rendered was improper : 1st, because the state had certain rights which the court was bound to consider ; and 2d, because the language of the petition did not warrant the judgment. The petition alleged that the only claim the state had upon the property was to secure the payment of \$676.80, with interest, and that there was no controversy between the state and Matilda W. Hummer as to the lien of the state. The judgment in no way affected the state, and any person desiring to bid at the sale of the real estate can readily ascertain the state's interest therein. The purchaser at the sale must buy subject to the lien of the state.

In regard to the other matter, it appears that an attachment had been issued, and, after the rendition of the judgment, an order for

the sale of the attached property was properly made: Code, sect. 222. If, however, there was any variance between the prayer of the petition and the judgment rendered, the petition could have been amended, and the judgment will not be reversed on account of such variance: *Railroad Co. v. Caldwell*, 8 Kans. 244; *Mitchell v. Milhoan*, 11 Id. 630.

The ruling and judgment of the District Court will be affirmed. All the justices concurring.

Debt lies on a judgment generally: 1 Chit. Pl. 121; 1 Tidd's Pr. 3; 3 Black. Com. 129; 1 Selw. N. P. 616; 3 Comyns's Dig. "Debt," a. 2; *Bank of Columbia v. Newcomb*, 6 Johns. 98; *Taylor v. Twiss*, 16 Id. 66; *Andrews v. Montgomery*, 19 Id. 162; *Townsend v. Carman*, 6 Cowen 695; *Haven v. Baldwin*, 5 Iowa 503; *Proctor v. Johnson*, 1 Ld. Raym. 670; *Anon.*, Salk. 209, pl. 3; *Millard v. Whittaker*, 5 Hill 408; *Jackson v. Shaffer*, 11 Johns. 513. So even though part of the judgment may have been collected: 2 Tidd's Pr. 1028; *Hessee v. Stevens*, 2 Smith's Rep. 39 S. C. The rule is the same whether the judgment be of a superior or inferior court: *Stuart v. Lander*, 16 Cal. 372; 1 Chit. Pl. 111; *Denison v. Williams*, 4 Conn. 402; *Cole v. Driskill*, 1 Blackf. 16; *Gardner v. Henry*, 5 Cold. 458. But in an action upon the judgment of an inferior court, the declaration must show the original cause of action to have been within such court's jurisdiction: 1 Selw. N. P. 616; *Read v. Pope*, 1 Cr., M. & R. 302; 1 Chit. Pl. 371; *Sheldon v. Hopkins*, 7 Wend. 435; *Spooner v. Warner*, 2 Bradw. 240; 4 Tyr. 403. Debt lies whether the judgment be of a domestic or foreign court; a judgment of a foreign court being *prima facie* evidence of indebtedness only; but the merits of a domestic judgment or that of a sister state where the court had jurisdiction of person and subject-matter cannot be gone into in an action founded on the judgment, and *nil debet* is not a good plea: *Freeman on Judg.*, § 435;

Mills v. Duryee, 7 Cranch 481; *Andrews v. Montgomery*, 19 Johns. 162; *Hutchcock v. Fitch*, 1 Cai. 461; *Taylor v. Bryden*, 8 Johns. 173; *Bimeler v. Dawson*, 4 Scam. 536; *Hubbell v. Coudrey*, 5 Johns. 132; *Nations v. Johnson*, 24 How. (U. S.) 203; *Geen v. Orrington*, 16 Johns. 55; *Wright v. Mott*, Kirby 152; *Bush v. Byvanks*, 2 Root 248; *Biddle v. Wilkins*, 1 Peters (U. S.) 686; *Cardesa v. Humes*, 5 S. & R. 65; *Hayward v. Ribbens*, 4 East 311; *Moore v. Bowmaker*, 2 Marsh. 392. In such a case the proper remedy is to have the judgment set aside or reversed by a direct proceeding for that purpose: *Horfy v. Daniel*, 2 Levering 161; 1 Chit. Pl. 370. But the record may be disproved to show that the court had not jurisdiction of the person of the defendant: *Knowles v. Logansport G. L. & C. Co.*, 19 Wall. 58; *Starbuck v. Murray*, 21 Am. Dec. 172. Debt also lies on a judgment recovered in a *qui tam* action in another state: *Heal v. Root*, 11 Pick. 389; *Spencer v. Brockway*, 1 Ohio 124. So, debt lies upon a money decree of a court of chancery of a sister state: *Warren v. McCarthy*, 25 Ill. 95; 1 Chit. Pl. 111; *Post v. Neafie*, 3 Caines Rep. 22; *McKim v. Odom*, 3 Fairf. 94; *Elliott v. Ray*, 2 Blackf. 31; *Evans v. Tatem*, 9 S. & R. 252; *Telford v. Oakley*, Hemp. 197. But not in Great Britain upon the decree of a domestic court, because such court has the necessary means of enforcing its own orders: 1 Chit. Pl. 111; *Henly v. Sopor*, 8 Barn. & Cress. 18, and *Carpenter v.*

Thornton, 3 B. & Ald. 52. And this rule is followed in *Richardson v. Jones*, 3 Gill & J. (Md.) 163. But *contra*: *Howard v. Howard*, 15 Mass. 196; *Pennington v. Gibson*, 16 How. (U. S.) 65; *Nations v. Johnston*, 24 Id. 203. And the general rule in this country seems to be that where debt will lie upon a judgment of a court of law, it will lie also upon a chancery decree under like conditions.

In debt on judgment the recovery of a second judgment does not merge the former: *Andrews v. Smith*, 9 Wend. 54; *Doty v. Russell*, 5 Id. 129; *Jackson v. Shaffer*, 11 Johns. 517.

The decision in the principal case, that debt will lie on a judgment within the time in which execution may issue, is supported by the great weight of authority: *Greathouse v. Smith*, 3 Scam. 54; 6 Wheelers Com. Law 268; *Hale v. Angel*, 20 Johns. 342; *Smith v. Mumford*, 9 Cow. 26; *Church v. Cole*, 1 Hill 645; *Denison v. Williams*, 4 Conn. 102; Com. Dig. "Debt" A 2; *Thomson v. Lee*, 22 Iowa 206; *Clark v. Goodwin*, 14 Mass. 237; *Davidson v. Nebaker*, 21 Ind. 334; *Ives v. Finch*, 28 Conn. 112; *Albin v. People*, 46 Ill. 372; *Stewart v. Peterson*, 63 Penn. St. 230. The reason for this rule is usually stated to be that interest cannot be collected on a judgment at common law without such second action: *Clark v. Goodwin*, 14 Mass. 237; *Hesse v. Stevenson*, 2 Smith 39, 42; *Stewart v. Peterson*, 63 Penn. St. 230.

The rule is the same whether execution has been returned or not. *Hale v. Angel*, 20 Johns. 343; *White River Bank v. Downere*, 29 Verm. 332. So with or without averring any special facts as a reason for bringing it: *Denison v. Williams*, 4 Conn. 402; *Ives v. Finch*, 28 Id. 112.

Notwithstanding the rule appears to be thus settled upon authority, it would seem more in accordance with one's sense of justice that, where nothing is to be

gained by the new action other than the coercion that may result from the mere piling up of costs, the common law should be amended by statute and the second action be denied, and this more equitable view, without the aid of legislation, has been adopted in *Pitzer v. Russel*, 4 Oreg. 124; *Lee v. Giles*, 1 Bail. (S. C.) 449. See, however, *Shooter v. McDuffie*, 5 Rich. Law 61, 66, where it was held that the common-law rule related only to fresh suit by common-law process, and not to a suit by foreign attachment.

In *Lee v. Giles*, *supra*, ALCOCK, J., says: "I can never sanction the idea that a new action should be permitted by way of punishing a debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant and just spirit of the common law. As long as the judgment is operative, the creditor has the means of enforcing payment; and if the debtor can pay, an execution is as effectual as another suit, and more expeditious."

In *Pitzer v. Russel*, *supra*, the question was very fully discussed and the conclusion reached "that neither the common law nor the practice in the various states of the republic, nor anything inherent in the subject, based on sound reason, gives to a judgment-creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

The question seems generally to depend on whether an action on a judgment could be brought within a year and a day, at common law, that being the time during which execution might issue. Several of the cases cited above take the ground that such action might be so brought, and refer generally to 2 Bac. Abr. *Debt*, A; Comyns's Dig. *Debt*, A 2, and Wheat. Selw. 445 (616, 7th Am. ed.); but these authorities cite 43 Edw. 3, 2 B., which is said, in *Lee v. Giles*, 1 Bailey 449, to be an authority that the

action would not lie within the time mentioned; and 2 D'Anv. Abr. 500, *Debt*, C, and 7 Vin. Abr. 352, *Debt*, N, are cited as approving of this view of the case.

In *Stewart v. Peterson*, 63 Penn. St. 230, SHARSWOOD, J., renders the decision in 43 Edw. 3, thus: "If one recover upon a statute merchant, the statute gives an execution by *capias*, and also against the land, notwithstanding he can have a writ of debt," and supports the former view of that case. See, also, *Clark v. Godwin*, 14 Mass. 237, 239.

In Alabama the courts seem to doubt whether the action would lie within a year and a day, but refuse to follow the

principle further, and permit an action to be brought after such time, but within ten years, the time in which execution may issue: *Kingsland v. Forrest*, 18 Ala. 519; *Elliott v. Holbrook*, 33 Id. 659.

The view taken by SHARSWOOD, J., in *Stewart v. Peterson*, of the decision in 43 Edw. 3, seems to be the correct one; and, if such is the case, the weight of modern authority, as above stated, is founded upon a proper view of the common-law rule, and if a change is desirable, it should be made by the legislature, and not by the courts.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Rhode Island.

SINGER MANUFACTURING CO. v. KING.

A refusal to deliver an article of personal property to the one entitled to it on demand, is *prima facie* evidence of a conversion.

It is no conversion in a bailee, who has received an article in good faith from a third person, to refuse to deliver it to the owner making the demand until he has had an opportunity to satisfy himself in regard to the ownership.

A servant receiving a chattel from his master ought not to give it up without consulting his master with regard to it; but, if after such consultation he relies on his master's title, and refuses to comply with the owner's demand, he is guilty of a conversion.

The defendant, by order of his principal, the American Sewing Machine Co., received through a fellow-servant, held a machine of the plaintiff on a claim of storage, which was ill-founded but in good faith, and refused to deliver it up. He had no personal interest in the matter. Held, that the defendant was liable.

EXCEPTIONS to the Court of Common Pleas.

Ziba O. Slocum, for the plaintiff.

Albert D. Bean, for the defendant.

The opinion of the court was delivered by

DURFEE, C. J.—This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The

testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H. Harris, agent for plaintiff, and that the defendant, who was agent for the American Sewing Machine Company, though he had the machine, refused to deliver it until storage was paid for it or until another machine belonging to the American Sewing Machine Company which the plaintiff had was returned. The defendant testified that the machine was brought to him by one Conner, an employee of the American Sewing Machine Company, that he was instructed to hold it for storage, and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing Machine Company. It further appeared that the machine had been leased to a Mrs. Lynch by the plaintiff company, that Conner had received it from her, leaving a machine of the American Company in place of it, that he had carried it to Harris, and that Harris refused to receive it, saying that his company had no machines out which were then due, that he then carried it to the American Sewing Machine Company and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it and that he had not authorized any one to store it with the American Company.

The court instructed the jury that if the defendant, when demand was made to him, was the agent of the American Sewing Machine Company and was holding the machine under their orders and not for himself or under his own control, then the defendant would not be guilty. The plaintiff excepted.

The plaintiff asked the court to instruct the jury that the defendant would be guilty unless he told the plaintiff when the demand was made that he was holding the machine as servant of the American Sewing Machine Company. The court refused so to instruct the jury, but did instruct them that the defendant's omission to give the information would not constitute a conversion, but would be evidence for them to consider in determining the question as to whether he was holding the machine as agent or not. The plaintiff excepted. The question is, were the instructions and the refusal to instruct correct.

Ordinarily when one person has the chattel of another it is his duty to deliver it to the owner or his agent on demand, and if he refuses to do so his refusal is evidence of a conversion. It is, however, only *prima facie* evidence and may be

explained: *Magee v. Scott*, 9 Cush. 148; *Robinson v. Burleigh*, 5 N. H. 225; *Dietus v. Fuss*, 8 Md. 148; *Green v. Dunn*, 3 Camp. N. P. 215; *Solomons v. Dawes*, 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership: *Carroll v. Mix*, 51 Barb. 212; *Lee v. Bayers*, 18 C. B. 599, 607; *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618; *Coles v. Wright*, 4 Taunt. 198. In the case of a servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it: *Mires v. Solebay*, 2 Mod. 242, 245; *Alexander v. Southey*, 5 B. & A. 247; *Berry v. Vantries*, 12 S. & R. 89. But after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion: *Lee v. Robinson*, 25 L. J., C. P. 249; s. c. 18 C. B. 599; 1 Addison on Torts, sect. 475; *Greenway v. Fisher*, 1 Car. & P. 190; *Stephens v. Elwall*, 4 M. & S. 259; *Perkins v. Smith*, 1 Wils. 328; *Gage v. Whittier*, 17 N. H. 312. The mere fact that he refuses, for the benefit of his principal, will not protect him; *Kimball v. Billings*, 55 Me. 147.

In the case at bar the defendant, acting as agent of the American Sewing Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem he had received his instructions before the demand in anticipation of it. He was not a mere servant but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires v. Solebay*, but from a fellow-employee, and he may have known—indeed the evidence carries the impression that he did know—all the circumstances in regard to it, and nevertheless co-operated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such was the fact we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained. We do not find any error in the

instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for a new trial.

Exceptions sustained.

Mr. Justice COOLEY has defined conversion as follows: "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion:" Cooley on Torts 428. Mr. Abbott, in his Law Dictionary, defines it to be "a wrong; consisting in dealing with the property of another as if it were one's own, without right." A third definition, given by an accurate writer, is this: "It may be laid down, as a general principle, that the assertion of a title to, or an act of dominion over, personal property, inconsistent with the right of the owner, is a conversion:" Note of Mr. Bigelow to *Donald v. Suckling*; Bigelow's Leading Cases on Torts 394. By a recent authority it has been said: "At common law, a conversion is that tort which is committed by a person who deals with chattels not belonging to him, in a manner which is inconsistent with the rights of the lawful owners:" Rapalje & Lawrence's Law Dict. See Bouvier's Law Dict.; 6 South L. Rev. 822.

Turning from the writers of authority, we find, among many, the following definitions of the courts: "Conversion consists in the exercise of dominion and control over property inconsistent with and in defiance of the rights of the true owner or party having the right of possession:" *Badger v. Hatch*, 71 Me. 565.

"Conversion means the wrongful turning to one's use the personal goods of another, or doing some wrongful act inconsistent with or in opposition to the right of the owner." *Nichols v. Newsum*, 2 Murphy (N. C.) 303.

"It is not necessary to a conversion that there should be a manual taking of the thing in question, by the defendant. It is not necessary that it should be

shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use." *Bristol v. Burt*, 7 Johns. 254.

"Any actual wrongful exercise or assumption by a person himself, or by another, by his procurement, over the goods of the real owner, by which he is deprived of them, is a conversion:" *Hale v. Ames*, 2 T. B. Mon. 143; s. c. 15 Am. Dec. 150. See generally, for definitions, *Bowlin v. Nye*, 10 Cush. 416; *Clark v. Whitaker*, 19 Conn. 319; *Murray v. Burling*, 10 Johns. 172; *Reynolds v. Shuler*, 5 Cow. 323; *Connah v. Hale*, 23 Wend. 462; *Spencer v. Blackman*, 9 Wend. 167; *Ferguson v. Clifford*, 37 N. H. 101; *Laverty v. Snethen*, 68 N. Y. 524; *Syeds v. Hay*, 4 T. R. 264; *Bell v. Layman*, 1 T. B. Mon. 39; s. c. 15 Am. Dec. 83; *Burroughes v. Bayne*, 5 Hurl. & Norm. 300; *Keyworth v. Hill*, 3 B. & Ald. 687; *Fouldes v. Willoughby*, 8 M. & W. 540; *Roach v. Turk*, 9 Heisk. 708; *Polley v. Lenox Iron Works*, 2 Allen 182.

Bearing in mind these definitions, that a conversion conveys with it the exclusion of the one entitled to it, of the possession of the article in question, we arrive at the effect of a demand upon and refusal by the one in possession, when such demand is made by the one lawfully, at the time of making it, entitled to the possession; the refusal denotes the exercise of an act of ownership over the chattel to the exclusion of the right of the rightful owner; it is an act in defiance of the owner's right. It is an act of ownership inconsistent with the dominion of the owner; his right of possession is denied.

It therefore follows that a demand for the chattel upon the party in possession, and a refusal to deliver it, taken together, are evidence of a conversion, because the one in possession, no matter in what way he obtained the possession, cannot lawfully detain such chattel after the owner has demanded it; and if he still detains it, it is evidence that he claims it as his own and so uses it: *Magee v. Scott*, 9 Cush. 148; *Folsom v. Manchester*, 11 Id. 334; *Sturges v. Keith*, 57 Ill. 451; *Coffin v. Anderson*, 4 Blackf. 395; *Way v. Davidson*, 12 Gray 465; *Munger v. Hess*, 28 Barb. 75; *Huxley v. Hartsell*, 44 Mo. 370; *Thompson v. Rose*, 16 Conn. 71.

Such evidence, however, is only *prima facie* evidence of a conversion—of a conversion prior to the making of the demand. If the plaintiff can prove an actual conversion without the demand, none need be made; and if the defendant is entitled to be called upon for a delivery up of the chattel, on refusal it will be presumed that he had, prior to such demand actually converted the chattel to his own use, to the exclusion of the rightful owner; “such demand and refusal are evidence of a conversion, *prima facie* sufficient to support this action:” *Way v. Davidson*, 12 Gray 465; *Sturges v. Keith*, 57 Ill. 451; *Folsom v. Manchester*, 11 Cush. 334; *Magee v. Scott*, 9 Id. 148; *Hagar v. Randall*, 62 Me. 439; *Zimmerman v. Fairbank*, 35 Wis. 368; *Pease v. Smith*, 61 N. Y. 477; *Gillet v. Roberts*, 57 Id. 28; *Battel v. Crawford*, 59 Mo. 215; *Robinson v. Hartridge*, 13 Fla. 501; *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492; *Ray v. Light*, 34 Ark. 421; *Ingersoll v. Barnes*, 47 Mich. 104; *Lockwood v. Bull*, 1 Cow. 322; s. c. 15 Am. Dec. 539; *Thompson v. Trail*, 6 B. & C. 39; *Lathrop v. Blake*, 23 N. H. 46; *Garvin v. Luttrell*, 10 Humph. 16; *Boothe v. Estes*, 16 Ark. 104; *Case v. N. Y. & New Haven Railroad Co.*, 1 E. D. Smith 522; *McCombie v. Davies*,

6 East 538; *Dietus v. Fuss*, 8 Md. 148; *Agar v. Lisle*, 1 Hob. 187; *Oxford's Case*, 10 Coke 57.

The reason why the demand and refusal does not of itself constitute a conversion is, that the defendant may have the right to detain the chattel, or it may not be in his possession and so beyond his power to return it. In such instances, if it appear from the plaintiff's evidence that the defendant has a right to retain the property, the latter may well rest the case without further evidence; but if it does not so appear, he must affirmatively show his right to retain it: *Isaac v. Clark*, 2 Bulst. 306; *Watt v. Potter*, 2 Mason 77; *Kennet v. Robinson*, 2 J. J. Marsh. 84; *Robinson v. Skipworth*, 23 Ind. 311.

His refusal may also be based upon the fact that he, at the time, has no control over the property, and that it is not in his possession. While evidence of a positive refusal, unexplained, is *prima facie* proof that the one making such refusal has the possession of the chattel demanded, it is not conclusive; and hence it follows, on this ground also, that proof of a demand and refusal is only evidence of a conversion, not a conversion itself, and such presumption may be rebutted: *Hunt v. Kane*, 40 Barb. 638; *Kelsey v. Griswold*, 6 Id. 436; *Kimball v. Post*, 44 Wis. 471; *Fillmore v. Horton*, 31 How. Pr. 424; *Irish v. Cloyes*, 8 Vt. 33; *Buck v. Ashley*, 37 Id. 475; *Morris v. Thomson*, 1 Rich. (S. C.) 65; *Davis v. Buffum*, 51 Me. 160; *Robinson v. Hartridge*, 13 Fla. 501.

Likewise his refusal may be based upon the ground that the person making the demand, is not, at the time, entitled to the possession of the chattel in question. If such is the case, the defendant is not bound to deliver up the article: *Wilson v. Wilson*, 37 Md. 1; *Dudley v. Abner*, 52 Ala. 572; *Ogle v. Atkinson*, 5 Taunt. 759; *King v. Richards*, 6 Whart. 418; *Carter v. Kingman*, 103 Mass. 517.

What a demand and refusal, unexplained, amounts to is very well illustrated by a special verdict. The question of a conversion is always one for the jury, to be drawn from the evidence: *Lockwood v. Bull*, 1 Cow. 322; *O'Donoghue v. Corby*, 22 Mo. 396; *Huxley v. Hartzell*, 44 Id. 370; *Watt v. Potter*, 2 Mason 78; *Dent v. Chiles*, 5 Stew. & Port. 383; s. c. 26 Am. Dec. 350. If the jury gives a special verdict, finding merely a demand and refusal, it is not sufficient to justify the entry of a judgment, even though the plaintiff has proven that he is the owner and entitled to the possession, which facts are also found by the jury: *Gordon v. Stockdale*, 89 Ind. 240, 245; *Oxford's Case*, 10 Coke 57; *Hill v. Corvell*, 1 N. Y. 522; s. c. 4 Denio 323; *Eason v. Newman*, Cro. Eliz. 495; *Isaac v. Clark*, 2 Bulst. 306; s. c. Moore 841; 1 Roll. 126; *Mires v. Solebay*, 2 Mod. 242. See Gould on Pleading, sect. 166.

And the same rule applicable to a jury is also applicable to a referee; he must find an actual conversion and not a mere demand and refusal for the act of conversion. He must draw the inference of conversion—the conclusion: *Munger v. Hess*, 28 Barb. 75.

That a demand and refusal does not constitute a conversion is easily perceived in another direction; as in the case of a demand and refusal made after suit brought. In such an instance they may go to the jury as evidence of a conversion prior to the bringing of the suit: *Morris v. Pugh*, 3 Burr. 1241; *Jessop v. Miller*, 2 Abb. App. Dec. 449; see *Storm v. Livingston*, 6 Johns. 44.

The refusal may be so qualified as to rebut the presumption of a conversion, and in such a case further proof in support of the allegation of conversion must be adduced: *Gillet v. Roberts*, 57 N. Y. 28.

The refusal must amount to a denial of the demandant's right: *Hagar v. Randall*, 62 Me. 439; *Spooner v. Holmes*, 12

Mass. 503; *Morris v. Thomson*, 1 Rich. (S. C.) 65; *Watt v. Potter*, 2 Mason 77; *McIntosh v. Summers*, 1 Cranch C. C. 41; *Robinson v. Burleigh*, 5 N. H. 225; *Thomson v. Sixpenny*, 5 Bosw. 293; *Zachary v. Pace*, 9 Ark. 212; *Barnes v. Taylor*, 29 Mo. 514; *Severin v. Keppell*, 4 Esp. 156; *Dent v. Chiles*, 5 Stew. & Port. 383; 26 Am. Dec. 350.

If the chattel has come into or is in the possession of the defendant lawfully and the owner demand the possession, and the former assign an unlawful excuse for retaining it, he thereby waives any valid excuse he may have for retaining it, and the refusal it is said, in some cases, is not only the evidence of a conversion, but the conversion itself. "It is true, a demand and refusal is not a conversion, but only evidence of one; and the reason is, the party may have a lawful reason for what he did. Here, however, he states the reason; and it is altogether insufficient; this refusal is without lawful excuse, and therefore without anything more, a conversion of the property to his own use:" *O'Donoghue v. Corby*, 22 Mo. 396; *Huxley v. Hartzell*, 44 Id. 370; *Alvord v. Davenport*, 43 Vt. 30; *Baldwin v. Cole*, 6 Mod. 212.

But the doctrine of these cases, and some others, is entirely untenable, the evidence can never be substituted for the fact necessary to be proven. Such a rule "confounds cause and consequence, the evidence of a fact with the fact itself. It assumes that the person demanding the property is always duly authorized to make such demand, and that the person in possession is always bound to know the rightful owner:" *Dent v. Chiles*, 5 Stew. & Port. 383; s. c. 26 Am. Dec. 350. "But, if the refusal do not turn upon the supposed want of authority, if the party waives an inquiry into the authority, or admits its sufficiency, and puts his refusal upon another and distinct ground, which cannot in point of law, be sup-

ported, there the refusal, under such circumstances, is presumptive evidence of conversion :'' *Watt v. Potter*, 2 Mason 78 ; 2 Greenl. Ev. secs. 644, 645. *Contra*, 6 Southern L. Rev. 834.

It is, however, well settled by the authorities that a refusal based upon reasons assigned at the time, is a waiver of all other excuses, even though valid ; and the one making such refusal cannot afterwards insist upon any valid right of retention he may have had at the time of the demand and refusal. He is bound to the statement he makes at the time, and can never urge another, unless, possibly, a new right to him should afterwards accrue before suit brought. This point clearly appears in the principal case : *Spence v. Mitchell*, 9 Ala. 744 ; *Ingalls v. Bulkley*, 15 Ill. 224 ; *O'Donoghue v. Corby*, 22 Mo. 394 ; *Judah v. Kemp*, 2 Johns. Cas. 411 ; *Robertson v. Crane*, 27 Miss. 362 ; *Watt v. Potter*, 2 Mason 77 ; *Barnes v. Taylor*, 29 Mo. 524.

In the case of a bailee, if he absolutely refuses to deliver the chattels to the owner on demand, or denies his right to them, or assumes to be himself the owner, or interposes an unreasonable objection to delivering them, or exhibits bad faith in regard to the transaction, a conversion of the property may be inferred. Thus where the defendant had received chattels from A. without knowing who was the owner, but having every reason to suppose A. to be the owner, and on demand being made by B. claiming to be the owner, did not set up any claim to them, nor dispute the claimant's right, but stated, in substance, that he did not know the claimant was the owner ; that the property was left by A., and that he desired the order of his father, or A., before delivering the same, or an opportunity to confer with his father in regard thereto ; it was held that this was not such a refusal as amounted to a conversion of the chattels : *Carroll v. Mix*, 51 Barb. 212 ; see *Tuttle v. Gladding*, 2 E.

D. Smith 157 ; *Holbrook v. Wight*, 24 Wend. 169 ; *Monnot v. Ibert*, 33 Barb. 24 ; *Fletcher v. Fletcher*, 7 N. H. 452 ; s. c. 28 Am. Dec. 359 ; *Lee v. Robinson*, 25 L. J. C. P. 249 ; *Lee v. Bayes*, 18 C. B. 607 ; *European & Austr. R. M. Co. v. R. M. St. P. Co.*, 30 L. J. C. P. 247 ; *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 618. Of course refusal to deliver the property to one whom the bailee knows to be the owner is a conversion ; especially so if the bailor had obtained it wrongfully : *Doty v. Hawkins*, 6 N. H. 247 ; s. c. 25 Am. Dec. 459 ; *Nickerson v. Darrow*, 5 Allen 419 ; *Stanley v. Gaylord*, 1 Cush. 536.

But a bailee who asks time to surrender the property to the bailor is not guilty of a conversion : *Dowd v. Wadsworth*, 2 Dev. (N. C.) L. 130 ; *Pillot v. Wilkison*, 32 L. J. Exch. 201 ; *Woodley v. Coventry*, 2 H. & C. 164 ; *Buxton v. Baughan*, 6 C. & P. 674.

So if a thing is bailed, and a third person, with the permission of the bailor, who is entitled to reclaim the thing, demands it of the bailee, but gives no evidence of his right to do so, the refusal of the bailee to deliver up the thing upon such demand, will not amount to a conversion : *Beckley v. Howard*, 2 Brev. (S. C.) 94 ; *Ingalls v. Bulkley*, 15 Ill. 224.

So a refusal after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter ; and a refusal from a misapprehension of the law may be reasonable, and so prevent its having the effect of a conversion : *Fletcher v. Fletcher*, 7 N. H. 452 ; s. c. 28 Am. Dec. 359 ; *Jacoby v. Laussatt*, 6 S. & R. 300 ; *Watt v. Potter*, 2 Mason 77 ; *Holbrook v. Wight*, 24 Wend. 169 ; *St. John v. O'Connel*, 7 Port. 466 ; *Zachary v. Pace*, 4 Eng. (Ark.) 212 ; *Ingalls v. Bulkley*, 13 Ill. 315.

In the case of a servant, it has been said that he does not do his duty if he gives

up the goods his master has entrusted him with, on the demand of a stranger, without a previous application to his master for instructions. Therefore, a refusal by the servant to deliver up the goods he has received from his master, without an order or authority from the latter, is a qualified, reasonable and justifiable refusal, and no evidence of a conversion: *Alexander v. Southey*, 5 B. & Ald. 249; *Mires v. Solebay*, 2 Mod. 245. The law gives the servant the privilege of saying that he received the goods from his master, and that the latter ought to have an opportunity of admitting or rejecting the claimant's title, and of giving instructions in the matter. Therefore, such a qualified refusal is not a conversion: *Lee v. Bayes or Robinson*, 18 C. B. 599; s. c. 2 Jur. (N. S.) 1093; 25 L. J. C. P. 249. After receiving his instructions of his master, or after having had an opportunity to receive them, if he sets up or relies upon the master's title, and gives an absolute and unqualified refusal to deliver up the goods, he is then guilty of a conversion of the goods, if the person demanding them is entitled to their immediate possession: *Lee v. Bayes or Robinson*,

supra. It is a conversion for the benefit of his master, for which the servant is liable: *Cranch v. White*, 1 Scott 314; s. c. 1 Bing. N. C. 414; 1 Hodges 61; *Stephens v. Elwall*, 4 M. & S. 259. See *Perkins v. Smith*, 1 Wils. 328, and *Coffin v. Anderson*, 4 Blackf. 395. See the instructive case of *Dent v. Chiles*, 5 Stew. & Port. 383; s. c. 26 Am. Dec. 350; 6 Southern Law Review 637.

If the person retaining the chattel is not a mere executive agent, but has discretionary power, and is a *locum tenens* of the principal, as in the principal case, invested with all the authority of his employer, like the superintendent of a factory, he is liable for a refusal; *Berry v. Vantries*, 12 S. & R. 89.

Nor can a servant, acquainted with all the facts, shield himself, if he dispose of the property in accordance with his master's orders: *Gage v. Whittier*, 17 N. H. 312; *Kimball v. Billings*, 55 Me. 147.

Of course the servant cannot maintain trover for his master's property: *Tuthill v. Wheeler*, 6 Barb. 362; *Lehigh Co. v. Field*, 8 W. & S. 232.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of the United States.

CONNECTICUT MUTUAL LIFE INS. CO. v. UNION TRUST CO.

A provision in a state statute that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that state, in trials at common law.

Section 721 of the Revised Statutes, declaring that "the laws of the several states except where the constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to competency of witnesses, except

as the latter subject may be regulated by specific provisions of the statutes of the United States.

To the question, in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No: *Held*, that the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury, or inconvenience, or prolonged suffering.

An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too vague and indefinite.

ERROR to the Circuit Court for the Southern District of New York.

The opinion of the court was delivered by

HARLAN, J.—This is an action upon a policy of life insurance in which a verdict and a judgment were rendered for the plaintiff. The policy was taken out on the 21st of February 1878, by the Union Trust Company of New York for the benefit of the children of William Orton who might survive him. The insured died on the 22d of April of the same year. In the application, signed by the trust company and by Orton, the following question (the seventh) was propounded: "Have you ever had any of the following diseases? Answer (yes or no) opposite each." Then follows a list of the diseases about which the applicant was asked—apoplexy, paralysis, insanity, epilepsy, habitual headache, fits, consumption, pneumonia, pleurisy, diphtheria, bronchitis, spitting of blood, habitual cough, asthma, scarlet fever, dyspepsia, colic, rupture, fistula, piles, affection of liver, affection of spleen, fever and ague, disease of the heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, neuralgia, dropsy, scrofula, small-pox, yellow fever, and cancer or any tumor. As to colic, fistula, and fever and ague, the answer was Yes, and as to all the other diseases, No. Being asked, in the same question, to state the number of attacks, character and duration, of all the diseases which he had had, the applicant answered: "Had fistula in 1871, induced by intermittent fever; radically cured."

The eighth question was: "Have you had any other illness, local disease, or personal injury; and if so, of what nature, how

long since, and what effect on general health?" The answer was: "Had colic for one day, October 1877; no recurrence; general health good."

The fourteenth was: "How long since you were attended by a physician; in what disease? Give name and residence of such physician." The answer was: "October 1877; for colic; Dr. Hasbrouck, of Dobb's Ferry; sick one day."

The fifteenth was: "Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer was: "No; nothing to my knowledge."

The sixteenth was: "Have you reviewed the answers to the above questions, and are you sure they are correct?" The answer was, Yes.

The application concluded in these words:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; * * and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Upon the back of the application were several endorsements, among them the following:

"PROOFS OF DEATH REQUIRED.—Blanks for the several certificates required to be made in proof of death will be furnished upon request."

The policy purports to have been issued in consideration of the representations and declarations made in the application, and of the payment of the annual premium at the time designated therein. It purports, also, to have been issued and accepted upon certain express conditions and agreements, among which are: "That the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the assured to be true in all respects, and that, if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void."

This action was brought to recover the amount insured—due notice and satisfactory evidence of death having been given. The company resisted recovery upon two grounds :

1. That the answers to the seventh, eighth, fourteenth, and sixteenth questions were false and untrue, and known to be by Orton, in this: that so far from his general health being good at the time of the making and delivery of the application and of the issuing of the policy, he had, for many years immediately prior thereto, suffered with piles, affection of the liver, and habitual headache, and within less than eighteen months prior to the application had been seriously ill for weeks, during which period several physicians attended him; that the illness in October 1877, continued for some days; that he visited Europe upon one or more occasions for the benefit of his health, and by reason of disease was much enfeebled in body; and that at the time of issuing the policy defendant did not know or have reason to believe that said statements, answers, and declarations, or any of them, were untrue, but, believing them to be true, issued the policy; and that by reason of these facts it was null and void.

2. That in the application it was declared that the statements therein were correct and true, and that there was not, to the knowledge of the insured, any fact relating to his physical condition, personal or family history, or habits, not stated in answer to the questions in the application, with which the officers of the defendant ought to be made acquainted; yet, he had been and was subject to and afflicted with the diseases therein specified; had a very serious illness and been attended by several physicians; was ill in October 1877, much longer than stated; and had visited Europe for his health; which facts were within his knowledge, and were material circumstances in relation to the past and present state of his health, habits of life, and condition, rendering an insurance on his life more than usually hazardous and with which the officers of the company should have been made acquainted; that these facts were concealed from, and misrepresented to, the company by Orton, whereby it was injuriously influenced, and induced to omit such examinations and precautions in reference to his condition and health as would have prevented the issuing the policy upon the considerations and conditions therein set forth; and that, by reason of such concealment and misrepresentation, the policy was and is absolutely null and void.

In support of the defence, physicians, who had attended the insured professionally, were examined as witnesses; and the first assignment of error relates to the refusal of the court to permit them to answer questions, the object of which was to elicit information which would not have been allowed to go to the jury, under section 834 of the Code of Civil Procedure of New York, had the action been tried in one of the courts of the state. That section provides that "a person, duly authorized to practise physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." It is not, and could not well be, seriously questioned, that the evidence excluded by the Circuit Court was inadmissible under the rule prescribed by that section. *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Same v. Same*, 80 Id. 281; *Pearson v. People*, 79 Id. 424; *Edington v. Aetna Life Ins. Co.*, 77 Id. 564; *Edington v. Mutual Ins. Co.*, 67 Id. 185.

But it is suggested that truth and justice require the admission of evidence which this statutory rule, rigorously enforced, would exclude, and that it can be admitted without disturbing the relations of confidence properly existing between physician and patient; that it would not afflict the living nor reflect upon the dead, if the physician should testify that his patient had died from a fever, or an affection of the liver; and that the rule, as now understood and applied in the courts of New York, shuts out, in actions upon life policies, the most satisfactory evidence of the existence of disease, and of the cause of death. These considerations, not without weight, so far as the policy of such legislation is concerned, are proper to be addressed to the legislature of that state. But they cannot control the interpretation of the statute, where its words are so plain and unambiguous as to exclude the consideration of extrinsic circumstances. Since it is for that state to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the Circuit Court of the United States is required, by the statutes governing its proceedings, to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative. By section 721 of the Revised Statutes, which is a reproduction of the 34th section of the Judiciary Act of 1789, it is declared that "the laws of the several states, except where the constitution, treaties, or statutes of the

United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States in cases where they apply." This has been uniformly construed as requiring the courts of the Union, in the trial of all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the states in which such courts are held. *Potter v. National Bank*, 102 U. S. 165; *Vance v. Campbell*, 1 Black 427; *Wright v. Bales*, 2 Id. 535; *McNeil v. Holbrook*, 12 Pet. 84; *Sims v. Hundley*, 6 How. 1.

There is no ground for the suggestion that sections 721, 858, and 914 of the Revised Statutes may be construed as relating to the competency of witnesses rather than to the nature and principles of evidence. While in some of the cases the question was whether a witness, competent under the laws of a state, was not, for that reason, under the 34th section of the act of 1789, a competent witness in the courts of the United States sitting within the same state, in others the question had reference to the intrinsic nature of the evidence introduced. In *McNeil v. Holbrook* the court held the courts of the United States, sitting in Georgia, to be bound by a statute of that state declaring, as a rule of evidence, that in all cases brought by an endorser or assignor on any bill, bond, or note, the assignment or endorsement, without regard to its form, should be sufficient evidence of the transfer thereof; the bond, bill, or note to be admitted as evidence without the necessity of proving the handwriting of the assignor or endorser. And in *Sims v. Hundley*, a notary's certificate, held to be inadmissible as evidence under the principles of general law, was admitted upon the ground that, having been made competent by a statute of Mississippi, it was competent evidence in the Circuit Court of the United States sitting in that state.

We perceive nothing in the other sections of the Revised Statutes to which attention is called that modifies section 721, except that, by section 858, the courts of the United States, whatever may be the local law, must be guided by the rule that "no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;" and by the further rule, that, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the

other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." "In all other respects," the section proceeds, "the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." As to section 914, it is sufficient to say that it does not modify section 721 in so far as the latter makes it the duty of the courts of the United States, in trials at common law, to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the states in which they sit.

For these reasons, it is clear that the Circuit Court properly refused to permit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity.

The widow of the insured having been called as a witness on behalf of the company, it is contended that the court erred in not allowing her to answer this question: "Did you not understand from your husband the nature of the disease?" That question, it is claimed, called for information derived from the insured as to the nature of any disease under which he may have been suffering at a particular time prior to his application. If she was a competent witness, and if the statements of the insured to her were admissible upon the issue whether he had concealed any fact in his personal history or condition with which the company ought to have been made acquainted, or upon the issue whether he had made fair and true answers to the questions put to him, still the question did not call for his statements, but only as to what the witness understood from him as to the nature of his disease. Her statements of what she understood may not have been justified by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind. The objection to the question was properly sustained.

This brings us to the consideration of questions more directly involving the merits of the case. The first of these relates to the refusal of the court to instruct the jury that if they "believe, on the evidence, that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance,

the policy is void, and the defendant is entitled to a verdict." This instruction was refused, and the court, among other things, said to the jury, that disease implied a substantial attack of illness, or a malady, which had some bearing on the general health of the insured, not a slight illness, or temporary derangement of the functions of some organ.

The defendant's request for instruction was properly denied, for the reason that it might have been construed as requiring a verdict for the company, upon its appearing simply that the insured, prior to his application, had experienced a slight, temporary affection of the liver, which had no tendency to shorten life, and all the symptoms of which had disappeared, leaving no trace whatever of injury to health. The insured was directed to answer Yes or No, as to whether he had ever had certain diseases, among which was included "affection of liver." It is difficult to define precisely what was meant by "affection of liver," as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand affection of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by itself, may include acute as well as chronic disease of the liver. He describes it as "a big bag to put many diseases in," and observes that it "would cover anything in the world the matter with the liver." It seems to the court, however, that the company, by its question, sought to know whether the liver had been so affected that its ordinary operations were seriously disturbed or its vital power materially weakened. It was not contemplated that the insured could recall, with such distinctness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury, or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, that is, of a character so well defined and marked as to materially derange for a time the functions of that organ, the answer that he had never had the disease called affection of the liver was a "fair and true" one; for, such an answer involved neither fraud, misrepresentation, evasion, nor concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted. The charge, upon this point, was in accordance

with these views, and no error was committed to the prejudice of the company.

There was evidence before the jury tending to show that the insured visited Europe in 1874, under the advice of Dr. Baner, a physician, and that he was ill in 1875 as well as in the month of October 1876. At the trial the defendant read in evidence, without objection, the proofs of loss received by it from the Trust company. The proofs were made on forms supplied by the insurance company. Among them was a certificate from Dr. Baner, who attended the insured in his last illness. That certificate was made up of questions to and answers by the physician. One of the questions required him to state the remote cause of death; if from disease, to give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress. His answer was: "The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement." He also stated, in the certificate, that the immediate cause of death was cerebral apoplexy; that he did not think the insured had any other disease, acute or chronic, or had ever had any injury or infirmity; and that there was nothing in his habits, or mode of life, predisposing him to disease, except a tendency to overwork.

Several instructions were submitted by the company touching this part of the case. In the form asked they were refused. But such refusal would not constitute ground for reversing the judgment, if the propositions they involved, so far as correct, were embraced by the charge. The jury were instructed, upon the whole case, that the insured warranted the truth, in all respects, of each answer, statement, representation and declaration contained in the application, which was a part of the policy; that any inquiry as to their materiality, or his good faith, was removed, by the agreement of the parties, from the consideration of the court or jury; that the truth of each answer was an express condition to the existence of liability on the part of the company; and that if the answers, or any of them, were, in fact, untrue, the contract was at an end, although the insured, in good faith, believed them to be true. Their attention was particularly called to the answer to the eighth question in the application, in which the insured—responding to the inquiry, whether he had had any other illness, local disease, or personal injury—stated nothing more than that "he had colic for

one day, October 1877; no recurrence; general health good." The court said: "Illness is a word which may include, properly, an attack of a less grave and serious character than a disease; an illness may be slight or severe; in either case it is an illness." Referring also to a question which required the insured to state any fact relating to his physical condition, personal or family history, or habits, not already disclosed, and with which the company ought to be made acquainted, the court—almost in the language of defendant's eighth request—charged the jury, that if they believed, on the evidence, "that the trip to Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, or the suffering of several attacks of malarial fever, accompanied by cerebral engorgement, (if those attacks occurred, or either of them,) were facts relating to the physical condition and personal history of the insured, of importance to the ascertainment of the condition of his health at the time of his application, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to recover." After reviewing all the evidence, the court concluded its charge by instructing the jury that if they found affirmatively that the insured "did not answer one of these questions truly, then there is nothing more for you to do except to find for the defendant; if you find affirmatively that he was guilty of concealment in his answer to the fifteenth question, then you will find for the defendant."

We are of opinion that the charge—the most important parts of which we have quoted—was not one of which the company had any reason to complain; and the plaintiff, having recovered a verdict, makes no objection to it.

In reference to that portion of the charge referring to the statements in the certificate of Dr. Baner, made part of the proofs of loss, the point is made that the court erroneously instructed the jury, that they could not, upon that certificate—made without cross-examination and simply to inform the company of the death of the insured—find as an affirmative fact, that the malarial attacks therein referred to as the remote cause of death, existed.

Without determining whether this certificate, so far as it assumes to state the causes of the death of the insured, was required by the contract as a condition of the plaintiff's right to sue on the policy, or whether, under the circumstances of this case, it was proof of all the facts stated in it, it is sufficient to say that the objection that

the court, in effect, discredited that certificate as *prima facie* evidence of the facts stated, cannot be entertained. No one of the requests for instructions submitted by defendant covers the precise point now made, nor was any exception taken, at the time, to that part of the charge which, it is claimed, refers to the certificate of the attending physician. The only exception taken by the defendant to the charge was "to the charge of the eighth proposition, as modified by the court and embraced in his general charge." The eighth proposition submitted by the defendant was given, in the words already quoted from the charge, with the modification, that the jury were to determine, on the evidence, whether the insured had had the before-mentioned attacks of malarial fever, accompanied by cerebral engorgement. That modification was entirely proper, since it was the province of the jury to determine the weight of the evidence. *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 77. If the subsequent part of the charge, which is now referred to as discrediting Dr. Baner's certificate as evidence of the facts stated in it, was regarded at the trial as a modification of the defendant's eighth proposition, or as objectionable in itself, the exception taken should have been more specific. The attention of the court should have been called to the particular point by something more definite than the general exception taken. *Beckwith v. Bean*, 98 U. S. 284; *Lincoln v. Clafin*, 7 Wall. 132; *McNitt v. Turner*, 16 Id. 362; *Beavar v. Taylor*, 93 U. S. 46.

No error was committed in overruling the instructions asked by the defendant, since whatever they contained that ought to have been approved, was embodied in the charge to the jury.

We find no error in the record of which this court can take cognizance, and the judgment must be

Affirmed.

Supreme Judicial Court of Massachusetts.

COMMONWEALTH v. POMPHRET.

If a club of men *bona fide* buy and own in common a stock of liquors, to be delivered by their steward only to actual members upon receipt of checks previously obtained from him at five cents each, such a delivery to a member for such checks, *bona fide* made, is not an illegal sale by such steward, and he is not indictable for unlawfully keeping liquors with intent to sell.

THIS was a complaint for unlawfully keeping liquor with intent to sell. Defendant was a member of a club of about one hundred

and fifty persons, which was organized several weeks before the seizure, for the purpose of furnishing its members with refreshments. The club had the usual officers, and employed defendant as steward, paying a certain sum per month for his services and for the use of the room where the liquors were found. Each member upon joining the club paid an admission fee of one dollar, and received certificate of membership. The money so obtained was used in buying a variety of liquors in the name and as the property of the club. Checks were printed, each representing five cents, and the steward was required to furnish these checks to members in such numbers as they were called for, at the rate of five cents each. The steward took care of the liquors of the club, delivered them to members as called for and received the price in checks. The liquors seized were the property of the club, obtained and designed to be used under the above arrangement, and were in his custody as steward.

At the trial below defendant asked the court to rule that there was no evidence to warrant a conviction. The court declined so to rule, but instructed the jury that, "if an association of persons, of whom the defendant was one, owned a quantity of intoxicating liquors which they kept under an arrangement to furnish them in such quantities as might be required, to be drunk on the premises, to such members of the association as should call for them in return for checks which represented certain designated values, and which were obtained from the defendant as a steward of the association, and were paid for, when obtained, at a price which they purported to represent, and the defendant was one of the persons keeping these liquors for said purpose, and was personally in charge of them, furnishing them in return for said checks, the jury may find that said liquors were kept by him for unlawful sale."

A verdict of guilty was returned, and with defendant's consent the case reported to this court.

Edgar J. Sherman, Atty.-Gen., for the Commonwealth.

J. B. Carroll, for defendant.

FIELD, J.—The instructions given in their application to the facts in evidence do not seem to us to differ materially from the instructions which were held erroneous in *Commonwealth v.*

Smith, 102 Mass. 144, except, in that case, the court below ruled that the facts supposed "would be a sale by the defendant," and in this case the court ruled that from the facts supposed "the jury may find that said liquors were kept by" the defendant "for unlawful sale." This change in the ruling may have been made for the purpose of meeting the suggestion found in the opinion in *Commonwealth v. Smith*, that the arrangement described "may have been a mere evasion of the law" which "would be a question not of law but fact, and would fall wholly within the province of the jury."

The legislature within the limitations of the constitution can prohibit, under a penalty, any acts it sees fit. The meaning of the statutes must be determined by construction, and criminal statutes are to be construed strictly, although the whole scope of the statutes must undoubtedly be considered. The legislature by the Pub. Sts. c. 100, sect. 1, has prohibited the "selling, or exposing or keeping for sale spirituous or intoxicating liquors," except as authorized in that chapter. It has not undertaken to prohibit the drinking or buying of intoxicating liquors; or the distribution of it in severalty among persons who own it in common. If, therefore, two or more persons unite in buying intoxicating liquor, and then distribute it among themselves they do not violate the statute, and the intent with which they do this is immaterial. If they intend in this manner to obtain intoxicating liquor to drink without thereby subjecting any person to the penalties of the statutes, they still act with impunity, because what they do is not prohibited by the statute. The evasion of the law intended in *Commonwealth v. Smith*, is an evasion by means of a form or device which is apparently legal, while the substance of what is done is within the prohibition of the statute.

In that opinion it is said, "If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some other person than the defendant, and if he merely kept the liquors for them and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the whole arrangement were a mere evasion, and the substance of the whole transaction were a lending of money to the

defendant that he might buy intoxicating liquors to be afterwards sold and charged to his associates, or if he was authorized to sell or did sell or keep any of the liquors with intent to sell to any persons not members of the club, he might well be convicted." The previously arranged system referred to was similar in many respects to that in the case at bar.

The word "club" has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of the members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy; and the sale of what might be called a temporary membership in the club with a sale of the liquors would not substantially change the character of the transaction. One inquiry always is whether the organization is *bona fide*, a club with limited membership into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club; or whether, either the form of a club has been adopted for other purposes with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create or a mere name has been assumed without any real organization behind it.

The decisions of other courts which are pertinent, undoubtedly turn more or less upon the particular language of the statute construed. *Graff v. Davis*, 8 Q. B. D. 375, was decided on the ground that there was no transfer of the general or absolute property, but a transfer of a special interest, as all the members of the club were owners in common, and that as the club was *bona fide* a club, the furnishing of liquors to a member was not a sale within the meaning of the English Licensing Act of 1872. *Sein v. State*,

55 Md. 567, was decided upon the same general ground. In *Richart v. People*, 79 Ill. 85, the court say that "The whole thing is a subtle artifice planned with a view to avoid the penalties denounced against persons violating the law." "The proposition is absurd that the ticket-holders really owned the liquors with which the bar was stocked." The court also say that if the theory of the defence were adopted, "the liquors would belong to the company as partnership stock, and the company would have no more rightful authority to sell to the individual members or partners at retail, without a license to keep a dram shop, than a mere stranger would have." "But the alleged association is a mere fiction." "The statute makes the giving away of intoxicating liquors, or other shift or device to evade its provisions unlawful selling." "It was a question of fact whether the association was a mere shift or device to evade the provisions of the law, and the jury having found it was, we see no reason to be dissatisfied with the conclusion reached." In *Marmont v. State*, 48 Ind. 21, it was distinctly decided that the delivery by the club or society through its agents, of beer which was the common property of the society, to a member of the society, upon credit or for cash, and which thereby became the separate property of the members was a sale within the meaning of the Indiana statute of 1873. *State v. Mercer*, 32 Iowa 405 resembles *Marmont v. State*. To the same effect is *Martin v. State*, 59 Ala. 34.

The decision in the case at bar is not to be governed wholly by any general definition of the words "sale" or "selling." After the decision in *Commonwealth v. Smith*, the St. of 1875, ch. 99 was passed, which is the foundation of those provisions in the Pub. Sta., c. 100, under which this complaint was made. Nothing is contained in that act or in any subsequent acts which in terms relates to clubs until the St. of 1881, c. 226, was passed. The provisions of the public statutes prohibiting the selling or exposing or keeping for sale of spirituous or intoxicating liquors, except those derived from St. 1881, c. 226, are similar to those contained in St. 1868, c. 141, which were construed in *Commonwealth v. Smith*. The statute of 1881, c. 226, is perhaps broader in its terms than was necessary to accomplish its apparent purpose, because no doubt has been expressed that a selling of intoxicating liquors by a club to persons who are not members is an illegal sale under other statutes unless the club is duly licensed to make the sale. The in-

tention of this statute, however, plainly is to distinguish between clubs in those cities and towns whose inhabitants vote to grant licenses, and clubs in those whose inhabitants vote not to grant licenses, and unlicensed clubs in the former cities and towns are left to be dealt with under other statutes. It must be assumed that the decision in *Commonwealth v. Smith* was known to the legislature at the time the existing statutes were passed. The inference is, that the legislature intended that unlicensed clubs in cities and towns whose inhabitants vote to grant licenses must be dealt with according to the construction given by this court to statutory provisions similar to those in existing statutes prohibiting the sale, exposing or keeping for sale of intoxicating liquors.

The ruling and instruction in this case seems to us to assume that this was *bona fide* a club; that the liquors were owned in common by the members; that they were furnished only to members; and that they were kept by the defendant as one of the members and as steward of the association. It does not appear in the exceptions in what manner new members were admitted, except that they paid an admission fee of one dollar, but we cannot assume that any person could join the association at his pleasure, and the ruling and instruction are not put upon the ground that there was evidence that this was an association open to everybody at a price. On the assumption upon which we understand the instructions proceed we think that under the decision in *Commonwealth v. Smith* it was not competent for the jury to find the defendant guilty.

New trial granted.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ARKANSAS.²SUPREME COURT OF KANSAS.³SUPREME JUDICIAL COURT OF MAINE.⁴SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁵SUPREME COURT OF NEW JERSEY.⁶ACTION. See *Check*.

Assumpsit—Money had and received—Privity of Contract.—Privity of contract, express or implied, is necessary to the maintenance of an action for money had and received: *Nolan v. Manton*, 17 Vroom.

A widow received from a savings bank money deposited by her husband in his own name. Letters of administration on the husband's estate were afterwards obtained by another person. In a suit against her by the administrator for money had and received, *held*, 1st. That if the defendant received the money on an undertaking to pay it to an administrator when one should be appointed, or to hold it for the benefit of the husband's estate, the trust would enure to the benefit of the administrator when letters were taken out, and thereupon a contract to pay him would be implied, on which he might sue. 2d. That if the defendant claimed the money as her own money—demanded it of the bank as her own—and the officers of the bank recognising her as the right owner of the money, paid it to her as money belonging to her in her own right, and she received it as such without any undertaking to hold it for another, the action could not be maintained for the want of privity of contract: *Id*.

Injunction Bond—Final Decree.—In a suit brought for a perpetual injunction a right of action does not accrue on an undertaking given on the issue of a temporary injunction or restraining order, until a final judgment in the suit in which it was issued is rendered, and a suit commenced on such undertaking before such judgment is prematurely brought and cannot be maintained: *Brown v. Galena Min. Co.*, 32 Kans.

A final judgment is one which finally decides and disposes of the whole merits of the case, and reserves no further question or direction for future or further action of the court. The voluntary dismissal by the plaintiff of the suit in which the injunction is issued is a final determination of that suit, and determines the right to sue on the undertaking

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 112 U. S. Rep.

² From B. D. Turner, Esq., Reporter; to appear in 43 Ark. Rep.

³ From A. M. F. Randolph, Esq., Reporter; to appear in 32 Kans. Rep

⁴ From J. W. Spaulding, Esq., Reporter; to appear in 76 Me. Rep.

⁵ From John Lathrop, Esq., Reporter; to appear in 137 Mass. Rep.

⁶ From G. D. W. Vroom, Esq., Reporter; to appear in 17 Vroom.

given on the issuing of a temporary injunction as effectually as a final judgment on a trial: *Id.*

APPORTIONMENT.

Interest on Notes—Trust Estates.—Interest due on notes accrues from day to day, and when to be appropriated to income may be apportioned, and unlike an annuity or dividend, which can be credited to income when payable, it is, when received, to be credited to income for the time during which it accrued: *Veazie v. Forsaith*, 76 Me.

A part of a trust estate, created by a trust deed, consisted of notes due from an estate which was insolvent. Without going through a process of insolvency, after paying other debts against the estate in full, the remainder of the property, by the agreement of all the parties interested, was appropriated to the payment of these notes, and in consideration thereof the notes, both principal and interest, were discharged, though not paid in full. *Held*, the loss is to be borne *pro rata* by the principal and interest, and the interest less the loss thus ascertained, is to be credited to the income for the years in which it was earned, and the remainder to the principal, except that portion of the interest earned before the date of the trust deed, which is to be credited to the principal: *Id.*

ASSUMPSIT. See *Action*.

BANK. See *Check*.

BILLS AND NOTES.

Alteration of Note by Endorser by adding a Signature as Maker—Accompanying Mortgage.—The addition of the signature of a surety to a promissory note, without the consent of the maker, does not discharge him: *Mersman v. Werges*, S. C. U. S., Oct. Term 1884.

A mortgage executed by husband and wife of her land, for the accommodation of a partnership of which the husband is a member, and as security for the payment of a negotiable promissory note made by the husband to his partner and endorsed by the partner for the same purpose, and to which note the partner, before negotiating it, adds the wife's name as a maker, without the consent or knowledge of herself or her husband, is not thereby avoided as against one who, in ignorance of the note having been so altered, lends money to the partnership upon the security of the note and mortgage: *Id.*

Alteration—Avoidance.—The material alteration of a promissory note avoids the note as to the maker not consenting thereto, even in the hands of a *bona fide* holder: *Horn v. Newton City Bank*, 32 Kans.

If a promissory note be altered by substituting another payee for the original payee, with the knowledge and consent of one of the makers, but without the knowledge or consent of the other maker, such material alteration releases from all liability the maker not consenting: *Id.*

CERTIORARI. See *Corporation*.

CHECK.

Action against Bank.—The holder of a check on a bank cannot sue the bank for refusal to pay it on presentation, though the drawer have

sufficient on deposit to meet it: *Creveling v. Bloomsbury Nat. Bank*, 17 Vroom.

COMMON CARRIER.

Loss of Goods—Agreed Valuation—Damages.—Goods delivered to a common carrier under a bill of lading containing a stipulation that they were shipped at an agreed valuation of a certain sum, and that, if a loss occurred for which the carrier was responsible, the value of the goods at the time and place of shipment was to govern the settlement, "except the value of the articles has been agreed upon with the shipper." The carrier had no knowledge of the value of the goods except that furnished by the statement of the shipper, and the charge for transportation was based upon such valuation. The goods were lost by the negligence of the carrier's servants. *Held*, in an action for such loss, that the shipper was estopped to claim more than the agreed valuation of the goods: *Graves v. Lake Shore & Mich. Southern Railroad*, 137 Mass.

CONSTITUTIONAL LAW.

Acquisition of Homestead—Conspiracy to Prevent.—The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands and perfect his right to the same, is the exercise of a right secured by the Constitution and laws of the United States within the meaning of sect. 5508 Rev. Stat. making amenable to penalty those conspiring to injure, oppose, &c., any citizen in the free exercise of such rights: *United States v. Waddell*, S. C. U. S., Oct. Term, 1884.

Regulation of Commerce—Tax on Oyster-Boats.—An act assessing a tax in proportion to tonnage on boats engaged in planting or taking oysters in certain localities is not repugnant to the Constitution of the United States, as an attempt to regulate commerce between the states: *Johnson v. Loper*, 17 Vroom.

The imposition of a license fee upon all boats engaged in planting or taking oysters in the said places, is not obnoxious to the requirement in the state constitution that property shall be assessed under general laws and by uniform rules, according to its true value: *Id.*

Citizenship of an Indian.—An Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognised as a tribe by the government of the United States, who has voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized or taxed or recognised as a citizen, either by the United States or by the state, is not a citizen of the United States, within the meaning of the first section of the fourteenth article of amendment of the constitution: *Elk v. Wilkins*, S. C. U. S., Oct. Term, 1884.

Regulation of Commerce—Exclusive Power of Congress.—Under Art. 1, Sec. 8, of the Constitution of the United States, the power of Congress to regulate commerce among the states—inter-state commerce—which consists, among other things, in the transportation of goods from one state to another, is exclusive: *Hurdy v. Atchison, Topeka and Santa Fe Railway Co.*, 32 Kan.

The fact that Congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one state to a place in another—inter-state commerce—does not empower the states of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that inter-state commerce shall be free and untrammelled: *Id.*

Query: Has not Congress legislated upon inter-state commerce by the act of June 15, 1856, authorizing all railroad companies to transport passengers and freight from state to state, and empowering them to receive and accept compensation therefor? Rev. Stat. of U S., sect. 5258: *Id.*

CONTEMPT. See *Malicious Prosecution*.

What Constitutes.—To constitute a direct contempt of court, there must be some disobedience to its order, judgment or process, or some open or intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice: *In re W. W. D. H.*, 32 Kan.

To constitute a constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice or bring the court or judge or the administration of justice into disrespect: *Id.*

D. executed his recognisance to appear in the District Court at a certain term and submit to a trial on a criminal charge pending against him in such court. He did not appear at such term, but absented himself from the county where the court was held. Proceedings were taken against him for a contempt, and he was convicted and imprisoned. *Held*, that the facts stated in the charge against him on which he was convicted, did not constitute a contempt for which he could be punished by fine or imprisonment: *Id.*

CONTRACT.

Sale—Damages to Personal Property—Rights of Special and General Owners to.—A mowing company, the owner of a lot of mowing machines, consigned and forwarded them to D., by virtue of a contract under which D. was to pay the freight on them and sell them for a specified commission, and account to the company for them at a specified price. *Held*, 1st. This contract did not change the title in the machines. 2d. D. had such special property in the machines as to enable him to maintain an action against a carrier for a wrongful act to the property, in which he would recover, not only his own damages, but such as accrued to the company as general owners. 3d. A sale of the property after the damage had accrued would not transfer the claim for damages: *Boston and Maine Railroad Co. v. Warrior Mower Co.* 76 Me.

CORPORATION.

President—Power to confess Judgment—Receiver.—The president of a corporation has no power, by virtue of his office as president, to execute a bond and warrant of attorney for the entry of a judgment by confes-

sion against the corporation: *Stokes v. New Jersey Pottery Co.*, 16 Vroom.

The powers of the president of a corporation over its business and property are strictly the powers of an agent—powers delegated to him by the directors, who are the managers of the corporation and the persons in whom the control of its business and property is vested: *Id.*

The president of a corporation, organized for business purposes, is its chief executive officer, and in virtue of his office has authority to perform all acts of an ordinary nature which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in the usual course of business. His authority to act for the corporation may also be enlarged beyond those powers which are inherent in his office, but those are cases where the agency of the officer has arisen from the assent of the directors, from their consent and acquiescence in permitting him to assume the direction and control of its business, and are instances of the application of the principle that a principal will be liable for the acts of his agent within the apparent authority conferred upon him: *Id.*

That the president of a corporation is the owner of nearly all its capital stock, and is its superintendent and treasurer and the active manager of its affairs, and was accustomed to borrow money for the company's use, will give him no power to encumber its property by a mortgage or judgment confessed for money borrowed: *Id.*

The corporation having become insolvent, its receiver, as the representative of creditors, has the capacity to take the objection that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon the corporation: *Id.*

Existence questioned Collaterally—Injunction.—Although the existence of corporations voluntarily organized under general statutes, cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers, under circumstances and for purposes not within the scope and purpose of legislative intent, and under shelter of their charter are about to exercise powers oppressive to an individual, they may be restrained by private suit of those injured or about to be: *Neimeyer v. Little Rock Junc. Railroad*, 43 Ark.

When the proposed action of a railroad company in taking land for its track is unauthorized, chancery may restrain it by an injunction: *Id.*

Gas Companies—Certiorari—Proceedings to Invalidate Grants of Similar Rights to Rival Companies.—Gas companies having the right to use the streets of a city for their gas pipes, may, by *certiorari*, challenge the legality of municipal proceedings designed to give similar rights to rival companies, and individuals owning the soil of a street may also question the claim of a gas company to lay its pipes therein: *People's Gas-light Co., v. Jersey City*, 17 Vroom.

Existence—Collateral Suit.—If the charter of a corporation provides that the corporation shall cease to exist if a certain thing is not done in a certain time, the question whether the corporation has ceased to exist can be judicially determined only in a suit to which the Commonwealth is a party: *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass.

COURT.

Orphans' Court—Decree of—Not Questioned Collaterally.—A

decree of the Orphans' Court, granting letters of administration, founded on a petition and proofs, presenting a colorable case, of the decease of the alleged intestate, and as to his residence, cannot be called in question in a collateral proceeding: *Plume v. Howard Sav. Ins.*, 17 Vroom.

CRIMINAL LAW. See *Witness*.

Carrying Weapon.—On the trial of a defendant for carrying a pistol as a weapon, it is not necessary to prove that the pistol was loaded: *State v. Wardlaw*, 43 Ark.

Former Conviction, when a Defence.—A former conviction is a bar to any offence of which the defendant might have been convicted under the indictment and proof in the first case. And so when a defendant has been convicted under a valid indictment for unlawfully selling liquor, and under proof of several different sales in a given time, and the state made no election as to which it would prosecute, the conviction is a bar to a subsequent indictment for any sale to the same party within the same time: *State v. Nunnally*, 43 Ark.

Husband and Wife—Coercion.—The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition and are responsible for their acts. The question whether a wife acted under the coercion of her husband or not is a question of fact, which should in all cases be left to the jury. *State of Kansas v. Hendricks*, 32 Kan.

DOMICILE.

Student—Residence—Presumption.—Bodily presence and an intention by the student to remain in such a place only because a student, or only as long as a student, do not confer domicile; the intention must be more than to make the place a temporary home, or student's home merely; it must be an intention to establish an actual, real and permanent home in such a place; to remain there for an indefinite period, regardless of the duration of the college course: *Sanders v. Getchell*, 76 Me.

The presumption is against a student's right to vote in such place, if he comes to college from out of town. His calling the place his home, or believing it to be his home, does not legally make it such. It is not his view of the facts that governs; the facts themselves govern the question. Each case must depend upon its peculiar facts: *Id.*

EASEMENT.

Proof of.—To an action for maintaining an artificial structure on the defendant's land in such a manner that rain water which fell on the roof of the structure was thrown on the plaintiff's land, the defendant set up a right by prescription to have the water so flow: *Held*, that the burden of proof was on the defendant to show an open, continuous, and adverse use of such servitude; and that the burden was not sustained by proof that the artificial structure had been in the same condition for more than twenty years: *Hooten v. Barnard*, 137 Mass.

If the plaintiff in an action proves an invasion of his rights by the defendant, he is entitled to recover at least nominal damages: *Id.*

ELECTIONS. See *Mandamus*.

EVIDENCE. See *Expert*.

Law of Other State—Judgment of Justice.—Matters of practice in another state may be proved by the testimony of lawyers skilled in the laws, usages and practice of the state : *Blackwell v. Glass*, 43 Ark.

A justice's judgment from another state can not be proved by a certified copy of his minutes like a certified transcript from a court of record. The original minutes must be produced, or a copy verified by the testimony of witnesses who have compared it with the original : *Id.*

EXECUTORS AND ADMINISTRATORS.

Opening Account.—If the administrator of the estate of a deceased partner in a firm has made a settlement with the surviving partners, and his account, including the amount received from such settlement, has been allowed by the Probate Court, that court has no jurisdiction to open the account, upon the petition of the successor of such administrator, to which the surviving partners only are made respondents, on the ground that the settlement was induced by the fraud of the surviving partners : *Blake v. Ward*, 137 Mass.

EXPERT.

Opinions of Non-professional Witness.—Non-professional witnesses, having sufficient opportunities of observing a person alleged to be insane, or *non compos mentis*, may give their opinions as to his sanity or mental condition as the result of their personal observation, after first stating the facts which they observed : *Boughman v. Boughman*, 32 Kan.

HUSBAND AND WIFE. See *Criminal Law*.

INJUNCTION. See *Corporation*.

Issued by Court without Jurisdiction.—A writ of injunction issued in a matter over which the court has no jurisdiction is void, and no one is bound to obey it : *Willeford v. State*, 43 Ark.

JUDGMENT. See *Corporation* ; *Evidence*.

LIMITATIONS, STATUTE OF.

Acknowledgment—Qualified Promise—Payment of by One Joint Promisee.—From an unqualified acknowledgment of a subsisting debt the law will imply a promise which will obviate the bar of the statute ; but if there be anything in the admission to repel the inference of a promise to pay, no promise will be implied, and the acknowledgment will not enable the plaintiff to recover ; and if the acknowledgment be coupled with a promise which is qualified or conditional, neither the acknowledgment nor the promise will be available unless the condition has been performed, or the event happened, by which the promise is qualified : *Parker v. Butterworth*, 17 Vroom.

Defendant, a joint maker of a promissory note, in a letter written to the plaintiff, admitted that he signed the note as surety : "It would be impossible for me to pay the note at this time ; therefore I shall be a thousand times obliged to thee if thee will allow it to rest until John" (the other maker) "or I, or both, are in better condition to liquidate

it :'' *Held*, to be a qualified promise by the defendant to pay when his circumstances had so improved that he had the ability to pay, and that the plaintiff could not make the promise available without affirmative proof of the substantial fulfilment of the condition : *Id.*

A payment on account by one joint promissor will not remove the bar of the statute of limitations as against a co-promissor in whose favor the statute had attached when the payment was made : *Id.*

Whitcomb v. Whiting approved and explained. *Channell v. Ditchburn*, 5 M. & W. 494, and *Goddard v. Ingram*, Q. B. 839, disapproved : *Id.*

MALICIOUS PROSECUTION.

Advice of Counsel.—In an action for malicious prosecution where the defendant claims that he acted under the advice of counsel, it is for the jury to say whether the fact, that the attorney and counsellor whose advice was sought was the attorney in a civil suit to recover of this plaintiff the sum alleged in the criminal proceeding to have been embezzled, made the attorney an improper person to consult—whether he was carrying on the suit under such circumstances and with such motives as prejudiced him and rendered him unfit to give fair and impartial advice in the premises : *Watt v. Corey*, 76 Me.

Action for Arrest on Civil Process—Contempt.—An action for damages does not lie against a plaintiff for the arrest upon civil process of a defendant, who was at the time privileged from arrest as a witness (without a writ of protection) returning home from court. The remedy consists in an application for a discharge from arrest ; the most expeditious mode being by summary motion to the court or some judge thereof : *Smith v. Jones*, 76 Me.

A person ordering an arrest of a witness upon civil process, may be punished for contempt of court for interference with its business : *Id.*

MORTGAGE. See Bills and Notes.

What a sufficient Record—Notice.—The deposit of a mortgage by the mortgagee in the recorder's office for record, the endorsement on it by the clerk, of the date of filing, and the putting of it in the place in the office where unrecorded mortgages are kept for record, are sufficient to affect with notice all who subsequently deal with the property, though the mortgagee do not expressly direct it to be recorded, and the endorsement do not say filed "for record :'' *Case v. Hargadine*, 43 Ark.

A mortgage is filed within the meaning of the statute when it is delivered to the proper officer, and by him received for the purpose of being recorded ; and his neglect to make the proper endorsement upon it, or to record it, will not prejudice the mortgagee : *Id.*

MUNICIPAL CORPORATION.

Power to License Drays—Police Regulation—Taxation.—The power to regulate wagons, drays, &c., conferred by the Municipal Corporations Act of March 9th 1875, includes the power to license as a means of regulating : *Fort Smith v. Ayers*, 43 Ark.

A license fee demanded by a municipal corporation for running a dray, when imposed as a mere police regulation and not as a measure

for raising revenue, is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for municipal supervision over the business: *Id.*

If a license upon an occupation is so large as to have been manifestly imposed by a city for the sole or main purpose of revenue, it is, in effect, a tax upon the owner or his property, and not within the power conferred by the statute: *Id.*

NEGLIGENCE. See *Master and Servant*; *Railroad*.

PARTNERSHIP.

Purchase by Partner from Firm.—One partner may acquire title to partnership property by purchasing from the copartnership, and if the purchase is not made with the intent to hinder, delay or defraud the creditors of the copartnership, and the property purchased is such as is exempt from levy and sale on execution under the statutes of the state, may hold it as against creditors of the copartnership: *Burton v. Baum*, 32 Kan.

RAILROAD. See *Corporation*.

Damages—Trustees for Bondholders—New Corporation—Liability.—Where trustees of the bondholders are in possession and operating a railroad, under a mortgage for the security of bondholders, they are liable, to the extent of funds received by them in operating the road, to keep the road, buildings and equipments in repair, furnish such new rolling stock as is necessary, pay the running expenses and apply the balance to the payment of any damages arising from misfeasance in the management of the road, and after that to the mortgage, as the rights of the parties may require. A claim for damages to property by fire, communicated by a locomotive while passing along its track at a time when the road was in the possession of and operated by such trustees, does not depend upon proof of malfeasance or negligence, but is an incident to the running of the road, and may be considered a part of the running expenses, and is therefore an equitable lien upon the funds liable in the hands of the trustees: *Stratton v. European and North American Railway*, 76 Me.

Where such trustees have paid and conveyed to a new corporation, formed by the bondholders, any such funds upon which there was such a lien to that extent the new corporation would be liable in equity to the person suffering the damage: *Id.*

In such case the bill should contain averments that at the time of the alleged injury and demand for payment, the trustees had in their hands or under their control any such funds, or that they subsequently conveyed any such funds to the new corporation: *Id.*

RECEIVER. See *Corporation*.

REMOVAL OF CAUSES.

Separable Controversy—What is not.—The fact that separate answers were filed which raised separate issues in defending against one cause of action, does not create separate controversies within the meaning of the second clause of Sect. 2, of the Act of March 3d 1875. They simply present different questions to be settled in determining the rights

of the parties in respect to the one cause of action for which suit was brought: *Ayres v. Wiswall*, S. C. U. S., Oct. Term 1884.

TAXATION. See *Municipal Corporation*.

TRUSTEES.

Exercise of Judgment—Repairs.—Where a trust deed requires the trustees to care for, manage and keep the trust property according to their "best judgment," it is their discretion which the grantor confided in and not that of the court. If not exercised in good faith the court may interfere, but not otherwise. It is for the trustees to decide whether repairs shall be temporary or permanent: *Veazie v. Forsaith*, 76 Me.

TRIAL.

Interpretation of Contract—Submission to Jury.—It is the province of the jury to find what words were used and the meaning of them, where an oral bargain is made. But the court may inform the jury what interpretations of the language used would be possible and permissible, and the jury must determine the meaning within the limits prescribed: *Connor v. Giles*, 76 Me.

A judge may withhold a case from the consideration of the jury when there is no evidence upon which they can in any justifiable view find for the party producing it, upon whom the burden of proof is imposed: *Id.*

It is not enough to require submission to a jury, that there may be a crumb or scintilla of evidence. It must be evidence of legal weight: *Id.*

TROVER.

Refusal to Deliver.—An unqualified refusal to deliver goods to an owner upon demand, by one in whose custody they were left by an officer who had taken them without authority, is a ground for an action in trover: *State v. Stevenson*, 17 Vroom.

WILL.

Omission of Child.—Under a statute providing that a child unintentionally omitted from a will should take a pro rata share the child is not entitled, if the omission of a child from his father's will is intentional, although the testator would not have entertained such intention but for a mistake as to the legal effect of matters outside of the will: *Hurley v. O'Sullivan*, 187 Mass.

WITNESS. See *Expert*.

Reputation—Evidence.—Evidence of the character and present reputation for truth of a witness is admissible to rebut evidence of his conviction of crime: *Gertz v. Fitchburg R. R. Co.*, 137 Mass.

Evidence is inadmissible, to rebut evidence of the conviction of a witness of crime, that he was innocent of the crime, and in explanation of his conviction: *Id.*

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REFORMATION IN EQUITY OF CONTRACTS VOID UNDER THE STATUTE OF FRAUDS.

Of all the points where the jurisdiction of courts of equity may come into conflict with the provisions of the Statute of Frauds, the one indicated by the title of this article is perhaps the most important as it is certainly the most disputed. It is a well-known principle that equity will relieve against the consequences of fraud, accident or mistake. But suppose that the relief proposed necessitates the reconstruction of an instrument of writing which, on its face, is void, as not fulfilling the requirements of the statute. Will equity withdraw it from the operation of the statute, reform it upon parol evidence, and then decree its specific performance?

It is believed that there are only two classes of cases where this direct conflict can occur: (1) Where the written agreement, as it stands, is too large; that is, where the parol evidence introduced to throw light upon the transaction shows that the contract, through fraud, accident or mistake, is made to include more in its subject-matter than was originally intended by the parties, and where the relief demanded is the rescission of the agreement as to this extraneous matter and its specific performance upon lines conforming to the real meaning of the parties: (2) Where the written agreement, as it stands, is too narrow—where it does not embody all the elements of the original contract, whether as to subject-matter or other provisions. And this will also include the

case of an agreement hopeless under the statute, in consequence of defects, omissions or obscurities. In regard to the first class, it seems to be generally admitted that since the acceptance of parol evidence to correct and reform it does not *make* a new contract, but only narrows one already made, it does not materially conflict with the statute. But in regard to the second class of cases, it is contended on the one hand, that the admission of oral testimony to enlarge the agreement to the full measure intended by the parties would be, in effect, to create a new contract out of elements previously resting in parol, by making it include a subject-matter not otherwise within its scope, and that under such circumstances the Statute of Frauds is conclusive and irrefragible. On the other hand, it is urged that it lies within the general jurisdiction of courts of equity to reform and enforce *all* agreements defective or imperfect through fraud or error. Here there occurs a decided conflict of authorities. One line of decisions holds that while parol evidence may be admissible in the first class of cases mentioned above, it must be strictly confined thereto. Another series of cases holds that parol evidence is alike to be entertained in either class of cases. The decisions are not to be reconciled—they can only be placed side by side. And it will be expedient first to review the cases upholding the strict application of the statute, and then those to the contrary.

Among the former class of cases, the most important and authoritative is that of *Glass v. Hulburt*, 102 Mass. 24, from the Supreme Court of Massachusetts. The opinion is by WELLS, J., and the following is an abridgment of it: The relief prayed for was that the contract (for the sale of land) should be made to include a certain portion of the tract which had been, through fraud or mistake, omitted from the conveyance already made. The opinion begins by stating the general jurisdiction of equity courts in cases of fraud and mistake, which is even, at times, concurrent with the remedy at law, but is always administered with reference to certain recognised rules and principles of chancery jurisprudence and often restricted by provisions of positive law. If there exists merely an oral contract, in such a case, then the Statute of Frauds is a perfect bar, and there can be no remedy except rescission. If there has been a part performance of the agreement, then, according to the general principles of equity, the case will be removed from the operation of the statute. But (1) payment of the whole consideration is not a sufficient perform-

ance for this purpose ; nor (2) is possession under a defective agreement ; nor (3) a conveyance only of a portion of the land, for that is in direct disregard and implied disavowal of the oral contract. The court then shows that to grant the relief demanded by the plaintiff would be to enforce the specific performance of a contract for the sale of land, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. Can this be done ? The power to rectify deeds and other instruments in writing exists in this court under one of two statutory clauses—that which confers jurisdiction in cases of fraud, accident or mistake, or that which provides for relief in chancery where there is no adequate remedy at law. But this power will always be exercised in subordination to statutory provisions. Among such provisions is the Statute of Frauds. This statute is not a mere rule of evidence, but a positive restriction upon judicial authority in affording remedies. It requires the contract to be substantiated by some writing, and the fact that the want of such writing is occasioned by fraud, accident or mistake, is not a material circumstance, unless superior equities intervene which will estop the defendant to set up the statute. “Where the proposed reformation of an instrument involves the specific performance of an oral agreement within the Statute of Frauds ; or where the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel, to deprive the party of the right to set up that defence.” Accident or mistake will not alone constitute such estoppel. There must also be a change of condition or position, made on the faith of the contract, with the knowledge and acquiescence, actual or implied, of the other party, and without redress if the agreement is defeated. Where courts of equity reform instruments and make them operative, it is because the oral agreement is binding, though imperfectly reduced to writing. But this is not the case where the oral agreement falls under the statute. If the statute intervenes, and the writing is imperfect, it is the same as if no writing in fact existed. Under the other head—fraud—if the party has changed his rights, it would be a fraud to set up the statute against him, and therefore it is not allowed. But this, again, supposes part performance.

Fraud in the preparation, form or execution of the instrument, only applies where the writing is perfect on its face and satisfies the statute; *e. g.*, where an absolute deed is declared a mortgage. "Fraud may destroy a title or right acquired by its means, but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one by its decree." "The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat, and to render full redress to the party upon whom it has been practised. This influence has led to decisions in which the facts of the particular case were regarded more than the considerations of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead if taken as the guide to judicial decrees. * * * We are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the agreement and relying upon the Statute of Frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed as to a direct suit for its specific performance. We are satisfied, also, that this is the rule to be derived from a great preponderance of the authorities." *Glass v. Hulburt*, 102 Mass. 24. See also *Pierce v. Colcord*, 113 Id. 372.

The next case in importance, and one entirely in accordance with the foregoing, is *Elder v. Elder*, 10 Me. 80. There the plaintiff sought to add certain terms to the written agreement, but this was held to be within the prohibition of the Statute of Frauds. The court holds the following language: "It is one thing to limit the effect of an instrument, and another to extend it beyond what its terms import. A deed by mistake conveys two farms instead of one. If the suffering party is relieved in such a case by a court of chancery, full effect is not given to the terms of a written instrument. But the Statute of Frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined in courts of

law and equity. A deed conveys one farm when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute. To do so, would be to enforce a contract, in relation to the farm omitted, without a memorandum in writing signed by the party to be charged or by his authorized agent. These are distinctions, which may be fairly taken, between the case cited from New York (*Gillespie v. Moon*, 2 Johns. Ch. 585), where the plaintiff sought to be relieved from the undue operation of a deed which conveyed too much, and the case before us, where the prayer of the plaintiff is, that a contract in writing may be so extended by parol testimony as to embrace more land than the contract covers. But whether this court, sitting as a court of equity, would receive parol evidence of a mistake in a deed, to restrain its operation, it is not necessary to decide. There may be a great appearance of equity in such a proceeding; but it may admit of question whether more perfect justice would not be administered by holding parties to abide by their written contracts deliberately made and free from fraud. As far as this rule has been relaxed by the clear, unequivocal, and settled practice of chancery, we are doubtless bound by it in administering that of our system, but we are not disposed to adopt any new or doubtful exceptions to so salutary a rule:" *Elder v. Elder* 10 Maine 80. See also 2 Wharton on Evidence, §§ 904, 1024.

In a later case in the same court, the description of the land was found to be defective, and specific performance was refused, on the ground of the statute: *Jordan v. Fay*, 40 Maine 130.

Another case following in the same line is found in the Connecticut reports: *Osborn v. Phelps*, 19 Conn. 63. The facts were as follows: A. and B. made an agreement for the sale of land, and separate writings were drawn up for their respective signatures, one for A. as the vendor, and the other for B. as purchaser; but by a mistake the former was signed by B. and the latter by A. And consequently neither of the papers presented the true intention of the parties. The papers did not refer to each other in such a way that they could be connected. The court held that there could be no reformation of this contract; on the ground that it was necessary for the plaintiff to establish: (1) that the contract had been reduced to *writing*, and (2), that it was *signed* by the party to be charged. Failing this, the Statute of Frauds intervenes peremptorily and the suit cannot be maintained. The deci-

sion of the court rested principally on *Clinan v. Cooke*, 1 Sch. & L. 22, and *Elder v. Elder*, *supra*. One justice, however, dissented. He seems to predicate his views upon a strong anxiety to preserve intact the jurisdiction of equity courts in matters of fraud, accident, and mistake, and to have been influenced by *Gillespie v. Moon*, (cited below), though admitting the latter case to be contrary to the preponderance of authority. But he bases his decision on grounds entirely foreign to this question.

The courts of Michigan also contribute their support to this side of the doctrine. In a decision there rendered, (*Climer v. Hovey*, 15 Mich. 18), it is held that equity may prune down a land contract which includes a larger subject-matter than was originally intended by the parties, but that nothing can be supplied or added, on parol evidence, to a contract too narrow, or void under the statute. The sole ground assigned is the statute itself. The principle of equitable estoppel is also recognised. The court relies upon the note to *Woollman v. Hearn*, cited below, and *Elder v. Elder*. Again, in a later case, "It is not the policy of courts of equity to enlarge the exceptions to the Statute of Frauds. Where parties see fit to neglect the means it provides for putting their agreements into a form which will prevent disputes, they must usually be content to trust to each other's promises, and not ask the courts to relieve them against the consequences of their own carelessness:" *Webster v. Gray*, 37 Mich. 37.

In a somewhat similar case the writing produced contained no sufficient description of the land to be conveyed, but it appeared that a subsequent verbal agreement between the parties fixed it accurately. But the court refused to reform the contract, stating that "courts of equity will not ordinarily compel the specific performance of a contract with variations or additions, or new terms to be made and introduced into it by parol evidence, for in such a case the attempt is to enforce a contract partly in writing and partly by parol, and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises under the Statute of Frauds:" *Whiteaker v. Vanschoiack*, 5 Oreg. 113.

A New York case holds that the *defendant* in a suit for specific performance may set up in defence, by parol evidence, that the contract does not express the true intent of the parties, through fraud, surprise, or mistake; but, by implication at least, refuses

the same privilege to a party complainant: *Best v. Stow*, 2 Sandf. Ch. p. *298. Other cases are cited in the note: *Dennis v. Dennis*, 4 Rich. Eq. (S. C.) 307; *Brooks v. Wheelock*, 11 Pick. 439; *Miller v. Chetwood*, 2 N. J. Eq. Rep. 199; *Nurse v. Seymour*, 13 Beav. 254; *Woollam v. Hearn*, 7 Ves. Jr. 211.

Finally, in the "Leading Cases in Equity" there is found a very able note to *Woollam v. Hearn*, by the American editor, discussing the whole subject of written instruments as varied or affected by parol, including the doctrine now under consideration. The note is too long to be more than briefly mentioned here. But it contains an elaborate review of all the authorities on the subject, approves *Glass v. Hulburt*, distinguishes *Gillespie v. Moon*, and its general trend is strongly in favor of supporting the statute: *Leading Cases in Equity*, Vol. II., Pt. I., p. 944 *et seq.* See particularly pp. 994-5-6.

But there is also an imposing array of authorities on the other side of the question. And in the first place, the case of *Glass v. Hulburt* has been often and seriously assailed. Pomeroy thinks that the allowance of reformation of the contract, in such cases, is not only supported by a great preponderance of judicial opinion, but is in entire accordance with the fundamental principles of equity jurisprudence; and he obviates the force of *Glass v. Hulburt* by showing that at the time that decision was rendered the equity jurisdiction of the Massachusetts and Maine courts was very limited, being conferred entirely by statute, and that it was the repeated declaration of those courts that they could not and would not extend their jurisdiction, thus defined, by implication: 2 Pomeroy's *Equity Jurisprudence*, § 866 *et seq.* This answer, however, is scarcely satisfactory, since the only question is, whether or not the jurisdiction of any court of equity *can* be large enough to work a virtual repeal of the Statute of Frauds. The leading case in favor of the equity side of the question is *Gillespie v. Moon*, mentioned above. The decision was rendered by Chancellor KENT in 1817. Here the premises to be conveyed were described, in the written agreement, by metes and bounds, adding the clause "200 acres, more or less," and the bounds given enclosed a tract of 250 acres. The bill was for a reformation of the contract, to make it include only the 200 acres originally intended. The chancellor says: "Whether such [parol] proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and

at the same time seeks to vary it by parol proof, has been made a question." But the court firmly inclines to the opinion that it is so admissible: *Gillespie v. Moon*, 2 Johns. Ch. 585. But note that this case is held not inconsistent with *Elder v. Elder*, *supra*, since it limits the effect of an instrument, but does not seek to extend it beyond what its terms import.

Following this comes another decision by the same eminent jurist: *Keisselbrack v. Livingston*, 4 Johns. Ch. 144. After noticing the English doctrine, that parol proof is admissible, in such cases, in favor of a *defendant*, but not in behalf of a plaintiff seeking specific performance. "And why should not the party aggrieved by a mistake in the agreement have relief as well where he is plaintiff as where he is defendant. It cannot make any difference in the reasonableness and justice of a remedy whether the mistake was to the prejudice of one party or the other. If the court has a competent jurisdiction to correct such mistakes (and that is a point understood and settled), the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under the decree of the court, as when made accurate by the act of the parties."

Again, "In *Elder v. Elder* it is said, 'a deed conveys one farm when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute.' And it is thus attempted to distinguish that case from *Gillespie v. Moon*, where the deed conveyed too much land. If this position rests upon the provisions of the Maine statute, it is well enough. But we cannot accede to it as the true rule of chancery jurisprudence, to be derived from the adjudged cases in England and America. In our opinion, a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether the mistake be the omission or insertion of a material stipulation; and whether it be made out by parol testimony, or be confirmed by other more cogent proofs. And the same rule applies to contracts within the operation of the Statute of Frauds:" *Tilton v. Tilton*, 9 N. H. 392. Affirmed in *Bellows v. Stone*, 14 Id. 175.

Again, it is held that where the evidence of mistake is clear and free from doubt, there exists no reason why the court should not correct the agreement and then decree its specific performance as

corrected: *Mosby v. Wall*, 23 Miss. 81. And, "there certainly can be no doubt now that it is competent to a party in a court of equity to offer parol evidence of a mistake in an agreement in writing relating to lands, to have it rectified, and then specifically executed as rectified. Cases establishing a contrary doctrine may readily be found, but these were repudiated by Chancellor KENT, who permitted the parol proof to be offered establishing the mistake, reformed the agreement according to the proof, and specifically executed it as reformed:" *Philpott v. Elliott*, 4 Md. Ch. 273. And again, "Nothing is better settled in this state than that not only can the ambiguities of a written instrument be explained by parol, but it may, in the same manner, be varied, added to, or even contradicted where it is shown that but for the oral stipulations made at the time, the party affected would not have executed it:" *Osley v. Phila. & Chester R. R. Co.*, 80 Pa. St. 370.

One of the broadest and most sweeping opinions is reported from Georgia. After giving an emphatic endorsement to *Gillespie v. Moon*, "we hold that parties, whether plaintiffs or defendants, whether seeking to set aside and cancel an agreement, or reform and enforce it, can be relieved, as well on account of mistake as fraud. It would be monstrous to suppose that the arm of the judiciary of Georgia was too short, or too weak, to reach and relieve, provided the contract variant from the true one could once be got into writing!" *Rogers v. Atkinson*, 1 Kelley 24-5. Affirmed in *Wall v. Arrington*, 13 Ga. 91.

Judge STORY gives the following views: "But the case intended to be put differs from each of these. It is where the party plaintiff seeks, not to set aside the agreement, but to enforce it when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English courts, not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances, been denied. But it is extremely difficulty to perceive the principles upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts, and to decree relief thereon. In America, Chancellor KENT, after a most elaborate consideration of the subject, has not hesitated to reject the distinc-

tion as unfounded in justice, and has decreed relief to a plaintiff standing in the precise predicament:" 1 Story's Equity Jurisprudence, § 161.

Finally, we quote from a well-known writer on equity. "The principles which underlie the theory advocated by the Massachusetts court, if carried out to their legitimate results, would work a virtual revolution in equity jurisprudence, would confine its most salutary remedial functions within very narrow limits, and would overturn doctrines which have been regarded as settled since the earliest periods of the jurisprudence. They would greatly abridge the remedy of reformation; they would prevent the court from establishing and enforcing parol contracts which the defendant's actual fraud had prevented from being put into writing; and, in fact, these principles cannot be reconciled with the doctrines upon which the jurisdiction of equity to enforce parol contracts in cases of part performance is vested. The Statute of Frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny nor overrule the statute; but it declares that fraud or mistake creates obligations and confers remedial rights which are not within the statutory prohibition; in respect of them, the statute is uplifted:" 2 Pomeroy's Eq. Jur., § 867.

Of course it is everywhere understood that any act distinctly amounting to a part performance of the agreement takes the case out of the statute.

H. CAMPBELL BLACK.

Saint Paul, Minn.

RECENT ENGLISH DECISIONS.

High Court of Justice; Queen's Bench Division.

SHAW v. PORT PHILLIP AND COLONIAL GOLD MINING CO.

The secretary of a joint-stock company issued a share certificate which purported to be signed by a director and by the secretary, and bore the seal of the company. The director's signature was forged and the seal had been improperly affixed. It was the regular and authorized duty of the secretary to have transfers registered, to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and to issue them. The plaintiff, to whom the shares were transferred by the person to whom the forged certificate was issued, applied to the company to have the shares registered in his name. The company refused to register them on the ground that the certificate was forged.

Held, that the company having made it the duty of their secretary and within the

scope of his authority to warrant the genuineness of the certificates he issued, the plaintiff was entitled to recover the value of the shares from the company.

SPECIAL case, of which the following are the material facts :

On December 1st 1880, Thomas Gledhill bought through the plaintiff, as his broker, 200 of the defendant company's shares, and the plaintiff received, as buying broker from the selling brokers, a transfer of forty shares, signed by a Mr. Schofield, accompanied by the certificates of the shares, and a transfer of 160 shares, signed by a Mr. Purchase, the company's then secretary, also accompanied by what purported, and in all respects appeared, to be regularly signed certificates of those shares.

In January 1881, Gledhill deposited the aforesaid transfers and certificates at the company's offices in London with the said Mr. Purchase, the company's secretary, and requested that the company should register him as proprietor of the said 200 shares, and issue him a certificate for the said shares in the usual way.

On March 16th 1881, a certificate, or what purported to be a certificate, of the said 200 shares, and of the registration thereof, was forwarded by the company's secretary to Gledhill.

This certificate purported to be signed by one of the directors and by Mr. Purchase, the secretary, and bore the seal of the company, and was in the usual and authorized form in all respects.

It was part of the regular and authorized duty of the said Mr. Purchase, as the company's secretary, to receive and examine transfers and certificates of shares, to have transfers registered to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them.

By the deed of settlement of the company it is provided that "the secretary shall keep in safe custody the books and the common seal of the company, affixing the seal of the company, or allowing its use to such documents, and on such occasions only, as he is authorized and required to affix it, or allow it to be used by the board of directors by resolution duly passed." By a resolution of the board of directors duly passed, it was ordered "that the seal be only used in the presence of either the chairman or deputy-chairman; and that certificates of shares be signed by one director, the secretary, and the accountant." At the time of issuing the certificate in question J. W. Purchase was both secretary and accountant.

The company in March 1881, paid a dividend to Gledhill upon the 200 shares, by check signed by the secretary and two directors of the company. Gledhill subsequently deposited the certificate for the 200 shares with the plaintiff, who was his stockbroker, by way of security for any moneys which might become due from him to the plaintiff.

In December 1882, the plaintiff gave the company notice that the certificate for 200 shares had been so deposited with him as security. He was then informed by the company that there was no such number of shares standing in Gledhill's name in their books; that the signature of the director appended to the certificate was forged, and the seal of the company was affixed thereto without the knowledge or authority of any one of the directors. Neither Gledhill nor the plaintiff had, up to the date of such communication, any knowledge or ground for suspecting, that the certificate was not a genuine document.

Gledhill subsequently executed what, in form, was a legal transfer of the 200 shares to the plaintiff, and the plaintiff left such transfer with Mr. Matthias, the present secretary of the company, with a request that the 200 shares should be registered in his name, pursuant to such transfer. The company declined to register the transfer, or to recognise the plaintiff's title to any of the said shares, except the aforesaid forty, as to which they were willing to recognise his title.

The question for the court was whether the plaintiff had a good title, as against the company, to the said 160 shares. If the opinion of the court was in the affirmative, judgment was to be entered for the plaintiff for the value of those shares.

R. O. B. Lane, for the plaintiff.

Moulton, for the defendants.

STEPHEN, J.—The question we are asked is whether the plaintiff has a good title, as against the company, to the shares in question. The whole matter turns on the following facts:—A certificate was issued, upon which the plaintiff bases his title. The certificate was in the usual and authorized form; it bore the seal of the company, and purported to be signed by one of the directors and by the secretary. It was issued by the secretary from the company's office. On the strength of this certificate a formal

transfer of the shares to the plaintiff was executed by Gledhill, and the question is, whether he now has a good title. The facts, which are not very clearly stated in the case, appear to be that the secretary did sign the certificate, and, without any authority, affixed the seal of the company, which was in his custody, and either himself forged the signature of the director, or procured it to be forged, and finally issued the certificate. That being so, it is admitted, on behalf of the defendant, upon the authority of the cases which have been cited, that, if there had merely been a false issue of the certificate in the absence of the directors, it would have bound the company. But it is contended that the present case differs from those referred to, because the director's name was forged, and the secretary carried out his fraud by means of forgery. How does this fact make any difference? It is said that it does so, because no decision has ever yet given validity to a forged document. It is asserted that there is a distinction between forgery and other fraud, but I fail to see that it is so. A director is to sign every certificate, and certain other formalities are to be observed. These formalities had, in the present case, apparently been observed. It is the duty of the secretary to see to the registration of transfers, to procure the preparation, execution, and signature of certificates with all requisite and prescribed formalities, and then finally to issue the certificate. His duties clearly give him the opportunity of forging. The person who receives the certificate knows whether he received it from the secretary, but he cannot verify the due observance of the other formalities. I think, therefore, that the company have made it part of the duty of the secretary, and within the scope of his authority, to warrant the genuineness of each certificate he issues, and that the plaintiff in this case is entitled to our judgment.

MATHEW, J.—I am of the same opinion. It is contended by the plaintiff that the company is responsible for the fraud of their agent. I cannot doubt but that what was done was within the scope of their secretary's employment. It cannot be intended, where formalities are laid down to be observed in the issuing of certificates, that it should be incumbent on the person receiving a certificate to ascertain for himself whether the formalities really have been complied with. I think, therefore, the secretary must be the company's agent to warrant the genuineness of the signa-

tures on the certificates. I cannot see any distinction between forgery and other fraud, which, it has been contended exists.

Judgment for plaintiff.

Ever since the celebrated "Schuyler Fraud cases" the law of America has been considered settled on the point involved in our principal case. There, as is well known, Robert Schuyler, an officer of the New York and New Haven Railroad Co., fraudulently issued stock, over-issued beyond the amount of the capital stock, which various parties received in good faith, and the company were held responsible to the holders for damages thereby sustained, the certificates themselves being held void and of no value, as, in fact, they represented nothing: *N. Y. & N. H. Railroad Co. v. Schuyler*, 34 N. Y. 30 and 80. And this just rule has been repeatedly followed in other states: *Bank of Kentucky v. The Schuylkill Bank*, 1 Pars. Eq. R. 180; *Willis v. Fry*, 13 Phila. R. 33; 36 Leg. Int. 47.

In such cases the act of the officer, though fraudulent, is the act of the corporation.

In like manner a corporation is liable

to the owner of stock whose name has been forged to a transfer of the certificate, and the corporation officers acting thereon in good faith, have cancelled the old certificate and issued a new certificate to the supposed lawful holder by such forged transfer: *Pratt v. Machinists' Nat. Bank*, 123 Mass. 110; *Pratt v. Boston & Albany Railroad Co.*, 126 Mass. 443; *Blaisdell v. Bohr*, 68 Geo. 56; *Pollock v. National Bank*, 3 Selden 274; *Sloman v. Bank of England*, 14 Sim. 475; *Midland Railway v. Taylor*, 8 H. L. Cas. 751.

In such case, however, the corporation is not without remedy, since it has an action over against the party presenting the forged transfer, on the ground of an implied warranty that such transfer is genuine and valid, even if such party be not the forger, but acted in good faith: *Boston & Albany Railroad Co. v. Richardson*, 135 Mass. 473.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

CHICAGO, M. & ST. P. RY. CO. v. ROSS.

The conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, and at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and for injuries resulting from his negligent acts the company is responsible.

The conductor of a railway train is the representative of the company, standing in its place and stead in the running of the train. The engineer is in that particular the conductor's subordinate, and for the former's negligence, by which the latter is injured, the company is responsible.

ERROR to the Circuit Court of the United States for the District of Minnesota.

J. W. Cary, for plaintiff in error.

C. K. Davis and *Enoch Totten*, for defendant in error.

The facts are fully stated in the opinion, which was delivered by FIELD, J.—The plaintiff in the court below is a citizen of Minnesota, and by occupation an engineer on a railway train. The defendant in the court below, the plaintiff in error here, is a railway corporation created under the laws of Wisconsin. This action is brought to recover damages for injuries which the plaintiff sustained while engineer of a freight train, by a collision with a gravel train on the 6th of November 1880. Both trains belonged to the company, and for some years he had been employed as such engineer on its roads. On that day he was in charge of the engine of a regular freight train which left Minneapolis at a quarter past one in the morning, its regular schedule time, and had the right of the road over gravel trains, except when otherwise ordered. At the time of the collision one McClintock was the conductor of the train, and had the entire charge of running it. It was his duty, under the regulations of the company, to show to the engineer all orders which he received with respect to the movements of the train. The regulations in this respect were as follows: "Conductors must, in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

When the freight train left Minneapolis on the morning of November 6th 1880, there was coming towards that city from Fort Snelling, by order of the company, over the same road, a gravel train, termed in the complaint a "wild train;" that is, a train not running on schedule time any regular trips. The conductor, McClintock, was informed by telegram from the train dispatcher of the coming of this gravel train, and ordered to hold the freight train at South Minneapolis until the gravel train arrived. South Minneapolis is between Minneapolis and the place where the collision occurred. The gravel train had been engaged for a week

before in hauling in the night gravel to Minneapolis from a pit near Mendota, for the construction by the company of a new and separate line of railroad between St. Paul and Minneapolis, and the freight train had, during this time, been stopped by the conductor, on orders of the train dispatcher, upon side tracks between Minneapolis and St. Paul Junction for the passage of the gravel train. But on the night of November 6th 1880, he neglected to deliver to the plaintiff the order he had received, and after the train started he went into the caboose and there fell asleep. The freight train, of course did not stop at the station designated, but, continuing at a speed of fifteen miles an hour, entered a deep and narrow cut three hundred feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about one hundred feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

On the trial the conductor of the gravel train testified that at the time of the collision he was under orders to run to South Minneapolis regardless of the plaintiff's train; that having twelve cars loaded with gravel his train stalled before reaching the cut where the collision happened; that he then separated his train in the middle, took six cars to Minnehaha station, went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that the gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time of plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at the same place about every night during the week.

It is evident from this brief statement that the conductor on each train was guilty of gross negligence. The conductor of the freight train was not only required by the general duty devolving on him as one controlling its movements to give to its engineer such orders as would enable him to avoid collision with other cars, but, as we have seen, he was expressly directed by the regulations of the company, when running by telegraph or special orders, to communicate

them to him. Had these regulations been complied with the collision would have been avoided. The conductor of the gravel train allowed it to be so overloaded that its engine was incapable of moving it at one portion of the road before reaching the cut; and when, in consequence, he was obliged to leave half of his cars on the track while he took the others to Minnehaha, he omitted to send forward information of the delay or to put out signals of danger. Having for the week previous passed the freight train at nearly the same place on the road, he must have known that by the delay there was danger of collision. Ordinary prudence, therefore, would have dictated the sending forward of information of his position, or the putting out of danger signals. Had he done either of these things the collision would not have occurred.

The collision having been caused by the gross negligence of the conductors, the question arises whether the company is responsible to the plaintiff for the injuries which that collision inflicted upon him. The general liability of a railroad company for injuries caused by the negligence of its servants to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have, them in contemplation when he engaged in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for

the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant. But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, while claiming such exemption he must not himself be guilty of contributory negligence.

When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases that he takes upon himself the risks arising from the negligence of his fellow-servants while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in *Murray v. Railroad Co.*, 1 McMull. 385, and was affirmed by the Supreme Court of Massachusetts the following year in *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49. In the South Carolina case, a fireman, while in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another, and that, as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

In the Massachusetts case, an engineer employed by a railroad company to run a train on its road was injured by the negligence of a switch-tender also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow-servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance; that those included the injuries which might befall him from the negligence of fellow-servants in the same employment; and that the switch-tender stood in that relation to him. And the court added that the exemption of the master was supported by considerations of policy. "When several persons," it said, "are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in the case of loss by the negligence of each other." And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another, it answered that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. "When the object to be accomplished," it said, "is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case." And it added, "that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not

exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one, whose rights are regulated by contract, express or implied." 4 Metc. 49, 60. The opinion in this case, which was delivered by Chief Justice SHAW, has exerted great influence in controlling the course of decisions in this country. In several states it has been followed, and the English courts have cited it with marked commendation.

The doctrine of the master's exemption from liability was first distinctly announced in England in 1850 by the Court of Exchequer in *Hutchinson v. York, N. C. & B. Ry. Co.*, 5 Exch. 343. *Priestly v. Fowler*, 3 Mees. & W. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair, and overloaded, and consequently broke down, and caused the injury complained of; but it did not appear what produced the defect in the van, or by whom it was overloaded. The court, in giving its decision against the plaintiff, observed that if the master was liable, the principle of that liability would "carry us to an alarming extent;" and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to his servant, he was, under the principle, responsible for the negligence of his coach-maker, or harness-maker, or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case, therefore, can only be considered as indirectly asserting the doctrine. At any rate, the *Hutchinson case* is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company who, in the discharge of his duty, was riding on one of its trains, was injured by a collision with another train of the same company, from which his death ensued; and it was held that his representa-

tives could not recover, as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not affect the principle. The rule was applied at the same time by that court to exempt a master-builder from liability for the death of a bricklayer in his employ, caused by the defective construction of a scaffolding by his brother workmen, by reason of which it broke, and the bricklayer at work upon it was thrown to the ground and killed. *Wigmore v. Jay*, 5 Exch. 354. The doctrine assumes that the servant causing the injury is in the same employment with the servant injured; that is that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In *Bartonskill Coal Co. v. Reid*, and the *Same Co. v. McGuire*, reported in 3 Macq. H. L. Cas. 266, 300, decided in 1858, the parties injured were miners employed to work in a coal-pit; and the party whose negligence caused the injury was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. "The miners," said the court in the latter case, could not perform their part unless they were lowered to their work; nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth; and, of course, at the close of their day's labor the workman must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent, and fail in his duty." Lord Chancellor CHELMSFORD, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to

ascertain whether servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him." The Lord Chancellor also commented upon some decisions of the Scotch courts, and among others that of *McNaughton v. Caledonian Ry. Co.*, 19 Ct. Sess. Cas. 271, and said that it might be "sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a joiner or carpenter who, at the time of the accident, was engaged in repairing a railway carriage; and the persons by whose negligence his death was occasioned, were the engine-driver and the persons who arranged the switches." And in the same case Lord BROUGHAM, after mentioning the observations of a judge of the Scottish courts that an absolute and inflexible rule, releasing the master from responsibility in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption there must be this most material qualification: that the two servants must be men in the same common employment, and engaged in the same common work under that common employment."

Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow-servants. Thus, in *Wilson v. Merry*, decided by the House of Lords in 1868, on appeal from the Court of Session of Scotland, the sub-manager of a coal-pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow-servant with the injured party. And the court laid down the rule that the master was not

liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. L. R., 1 H. L. Scotch App. 326. In this case, as in many others in the English courts, the foreman, manager, or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in a department separated from each other, and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow-servants, however widely separated may be their labors. See *Holden v. Fitchburg R. Co.*, 129 Mass. 268. But, notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so.

There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters,

and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who as to them and the train, stands in the place of and represents the corporation.

As observed by Mr. Wharton in his valuable Treatise on the Law of Negligence: "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." Section 232 *a*. The author, in a note, refers to *Brickner v. New York Cent. R. Co.*, decided in the Supreme Court of New York, and afterwards affirmed in the Court of Appeals; and to *Malone v. Hathaway*, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the

court. They indicate, however a disposition to ingraft a limitation upon the doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus, in the first case, the court said: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When the directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be, and is, a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptance of those terms, any more than is a director who exercises the same authority." 2 Lans. 516. Affirmed in 49 N. Y. 672. And in *Malone v. Hathaway*, in the Court of Appeals, Judge ALLEN says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect, the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 12. See, also, *Corcoran v. Holbrook*, 59 N. Y. 517.

In *Little Miami R. Co. v. Stevens*, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the

cars were to start and when to stop, it was liable for an injury received by him caused by the negligence of the conductor: 20 Ohio 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer and conductor were fellow-servants, and that the engineer had, in consequence, taken, by his contract of service, the risk of the negligence of the conductor; and also that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. "If men are influenced," said the court, "by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind." In *Railway Co. v. Keary*, 3 Ohio St. 201, the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor in such case was the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that, from the very nature of the contract of service between the company and employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as

a man, and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other."

In *Louisville & N. R. Co. v. Collins*, 2 Duv. 114, the subject was elaborately considered by the Court of Appeals of Kentucky; and it held that, in all those operations which require care, vigilance and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively, present through its agents who represent it, and whose acts, within their respective spheres, are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow-servant, was not adopted to its full extent in that state, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his Treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will, at no distant day, induce its universal adoption."

There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no

further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language, in some sentences, may be open to verbal criticism, but its purport touching the liability of the company is that the conductor and engineer, though both employees, were not fellow-servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of the freight train, in failing to show to the engineer the order which he had received, to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed; and the court charged the jury that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable; holding that the relation of superior and inferior was created by the company, as between the two, in the operation of its train, and that they were not, within the reason of the law, fellow-servants engaged in the same common employment. As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. *Brobst v. Brock*, 10 Wall. 519. And, with respect to the negli-

gence of the conductor of the gravel train, no instruction was given or requested.

Judgment affirmed.

BRADLEY, J.—Justices MATTHEWS, GRAY, BLATCHFORD and myself dissent from the judgment of the court. We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employees on the train. We think that to hold otherwise would be to break down the long-established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants.

LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT.—The general principle which prevails in England and the United States is, that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-servants in the course of the common employment. The first English authority upon the subject is the case of *Priestly v. Fowler*, 3 Mees. & Wels. 1, decided in 1837. In the United States the question does not seem to have been passed upon until 1841, in *Murray v. Railway Co.*, 1 McMullan 385. The next case was *Farwell v. Boston, &c., Ry.*, 4 Met. 49. In this case Mr. Chief Justice SHAW, in an exhaustive opinion, approved the former cases. The general doctrine of these cases has since been followed both in England and the United States. *Skip v. England Eastern Counties Railway Co.*, 9 Exch. 223; *State v. Malster*, 57 Md. 287; *Blake v. Ill. Cent. Ry. Co.*, 70 Ill. 60; *Gravelle v. Minn. &c., Ry. Co.*, 3 McCrary 352; *Beilfus v. N. Y. Cent. Ry.*, 29 Hun 556; *Rohback v. Pacific Ry.*, 43 Mo. 187; *Wonder v. B. & O. Ry. Co.*, 32 Ml. 411; *Summerhays v. Kan. Pa. Ry. Co.*, 2 Col. 484; *Yeomans v. Contra Costa Co. Co.*, 44 Cal. 71; *Brothers v. Cartter*, 52 Mo. 372; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *C. & B. & Q. Ry. v. Clark*, 2 Brad. 596; *Mur-*

ray v. Currie, L. R., 6 C. P. 24; *Price v. H. D. N. Co.*, 46 Tex. 535.

This principle applies to a minor 19 years of age. But in *Siegel v. Schautz*, 2 N. Y. (S. C.) 553, the master was held liable for the negligence of a foreman in placing a boy of 12 years in a dangerous position. See also *Coombs v. New Bedford C. Co.*, 102 Mass. 573. And a railway company is liable where a minor is set to do perilous work for which he was not employed. *Ry. Co. v. Fort*, 17 Wall. 553. But see *Anderson v. Morrison*, 22 Minn. 274; *Curran v. Merchants' Manuf. Co.*, 130 Mass. 374.

As to what negligence is deemed that of a fellow-servant, see *Smith v. Lowell Manuf. Co.*, 124 Mass. 114; *Killer v. Faxon*, 125 Mass. 485. A railway company is not liable for damages at the suit of one of its employees, for injuries received in a collision between two trains, when such collision is caused by the gross negligence of those in charge of one of the trains. *Bull v. Mobile, &c., Ry. Co.*, 67 Ala. 206; *Chicago, &c., Ry. Co. v. Doyle*, 60 Miss. 977. In *Stringham v. Steuart*, 64 How. Pr. 5, the plaintiff, a servant of the defendant, was injured by the falling of an elevator used to hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised.

The defendant was held not liable. As to what is a sufficient averment of the negligence of a fellow-servant, see *Helfrich v. Williams*, 84 Ind. 553. But a master is not relieved from liability in all cases when a servant is injured by the negligence of a fellow-servant, but only where the servants are engaged in the same common employment; that is, in 'the same department of duty, not in departments essentially foreign to each other. *King v. Ohio, &c., Ry. Co.*, 14 Fed. R. 277. For instances in which the master has been held liable, see *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; *Sheehan v. N. Y. Cent. Ry. Co.*, 91 N. Y. 332.

In *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, the plaintiff in the course of his employment as an engine driver for the defendant, was injured by the collision of the train on which he was, with another train. Held, that if the negligence of the defendant had a share in causing the injuries to plaintiff, it was liable, notwithstanding the contributory negligence of his fellow-servant.

Where the liability of a railway company for injury to one of its track repairers, by the careless manner of running a train, is in issue, evidence tending to show that the train causing the injury was in charge of a conductor and an engineer, and was at the time engaged in a race at a high and dangerous rate of speed with a train on a parallel road, over several public crossings, on a curve on which the track repairer was at work, in the city limits, and where trains should be run with care corresponding with the circumstances, without sound of bell or whistle, or slack of speed, or any other precaution to warn the men employed at work on the track of approaching danger, is competent to go to the jury, and should be submitted to it under proper instructions, and it is error to grant a nonsuit on the assumption that the negligence and carelessness causing the injury was that of a co-employee in the same

service, and not that of the company. *Dick v. Railway Co.*, 38 Ohio St. 390.

In some states the common-law rule has been changed by statute, so far as employees of railways are concerned. *Pyne v. C., B. & Q. Ry. Co.*, 54 Iowa 223; *Ditberner v. Chicago, &c., Ry. Co.*, 47 Wis. 138; *Union Trust Co. v. Thomason*, 25 Kan. 1; *Peterson v. W. Coal & M. Co.*, 50 Iowa 674; *Mo. Pacific Ry. Co. v. Haley*, 25 Kan. 35. In the latter case it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up the tools and put them in the caboose or tool car, was within the statute making railway companies liable to their employees for injuries resulting from the negligence of co-employees, who under the Iowa statute are to be regarded as engaged in the operation of a railway. See *Schroeder v. C. R. Ry. Co.*, 47 Iowa 375; *Lombard v. C., &c., Ry.*, Id. 494; *Smith v. B. C., &c., Ry. Co.*, 59 Id. 78.

As to the general rule, as was said by Mr. Justice HARLAW, in *Hough v. Railway Co.*, 100 U. S. 214, "very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application to the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages? what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation? who, within the true sense of the rule, or upon grounds of public policy, are to be deemed 'fellow-servants' in the same common employment or undertaking—are questions in reference to which much contrariety of opinion exists in the courts of the several states. Many of the cases are very wide apart in the solution of those questions."

WHO ARE FELLOW SERVANTS.—A "fellow servant," within the meaning of

the general rule, is usually held to be any one serving the same master in the same common employment, and under his control, whether equal, inferior or superior in his grade or standing. Thus an overseer is a fellow-servant of the laborer under his charge: *Brown v. Winona, &c., Ry.*, 27 Minn. 162. A mere foreman and workman under him are fellow-servants: *Feltham v. England*, L. R., 2 Q. B. 33; *Keystone Bridge Co. v. Newberry*, 96 Penn. St. 246; *C. & T. Ry. Co. v. Simmons*, 11 Brad. 147; *Daubert v. Pickel*, 4 Mo. App. 591; *Hoth v. Peters*, 55 Wis. 405; *Peterson v. W. Coal & Min. Co.*, 50 Iowa 674.

The following have been held to be fellow-servants: A laborer engaged in the service of a city and the foreman over him: *McDermott v. Boston*, 133 Mass. 349. A foreman of a lock who was engaged in superintending the raising of a vessel in the lock, and a laborer in the same work. See also *McDonald v. Eagle, &c., Co.*, 67 Ga. 761; s. c. 68 Id. 839. A switch tender, and an engineer; *C., R. I., &c., Ry. Co. v. Henry*, 7 Br d. 322. A detective employed to watch a track, and those running trains: *Pyne v. C., B. & Q. Ry. Co.*, 54 Iowa 223. A track repairer and a brakeman: *Holden v. Fitchburg Ry. Co.*, 129 Mass. 268. A yard switchman, and a car inspector: *Gibson v. N. C. Ry. Co.*, 22 Hun 289. A yard-master and his associate: *McConker v. Long Id. Ry. Co.*, 84 N. Y. 77. A fireman and a brakeman on the same train: *Greenwald v. M. H., &c., Ry. Co.*, 49 Mich. 197; *Nashville C., &c., Ry. Co. v. Wheelless*, 10 Lea (Tenn.) 741; s. c. 43 Am. R. 317. A conductor and a brakeman: *Thayer v. St. L., &c., Ry. Co.*, 22 Ind. 26; *Smith v. T. P. M. Ry. Co.*, 46 Mich. 258. Engineer and telegraph operator, under certain circumstances: *Dana v. N. Y. Cent. Ry.*, 23 Hun 473. Engineer and brakeman: *Railway Co. v. Ranney*, 37 Ohio St. 665. The runner of a steam-engine employed in lowering material

and hoisting rock, in sinking a shaft, and the men in the shaft engaged in excavating and loading the rock to be hoisted: *Buckley v. Gould, &c., Co.*, 8 Sawyer C. C. 395; s. c. 14 Fed. R. 833 and note. Yard hand and person employed to strip engines: *C. & N. W. Ry. Co. v. Scheuring*, 4 Brad. 534. A "mining boss" and a "drain boss." *Lehigh Val. Ry. Co. v. Jones*, 86 Pa. St. 433. A journeyman carpenter and bridge builder, and one laboring with him and directing the job. *Yager v. Atlantic, &c., Ry.*, 4 Hughes 192. Superintendent, who received half of the profits, and one employed as a laborer. *Zeigler v. Day*, 123 Mass. 152. A road master, whose duty it was to turn the switch, and the fireman and engineer. *Walker v. B. & M. Ry. Co.*, 128 Mass. 8. *Miller v. B. & M. Ry. Co.* Id. Coupler of cars and an engineer. *Valterz v. O. & M. Ry. Co.*, 85 Ill. 500. "Mining bosses" and miners under the provisions of the Mine Ventilation Act of 1870. *Del., &c., Canal Co. v. Carroll*, 89 Pa. St. 374. Laborer employed in hoisting coal by machinery, and engineer tending the engine running the same. *Wood v. New Bedford Coal Co.*, 121 Mass. 252. *Prima facie* a person employed to superintend the digging of a trench, and the laborers employed to dig it. *Flynn v. Salem*, 134 Mass. 351; *Floyd v. Sugden*, 134 Mass. 563.

See generally as to who are fellow-servants—*Lovegrove v. L., &c., Ry. Co.*, 16 C. B. (N. S.) 669; *Kelly v. Johnson*, 128 Mass. 530; *Crispin v. Babbitt*, 81 N. Y. 516; *Nat. Tube Works v. Bedell*, 96 Pa. St. 175; *Keystone Bridge Co. v. Kennedy*, Id. 246; *Wiggett v. Fox*, 11 Exch. 832; *Barringer v. Del., &c., Canal Co.*, 19 Hun. 216; *McAndrews v. Burns*, 39 N. J. L. 117; *Albro v. Agawam, &c., Co.*, 6 Cush. 75; *Railway Co. v. Lewis*, 33 Ohio St. 196. Whether a stevedore and a laborer are fellow-servants held, under the circumstances, a fact for the jury. *Mullan v. P. & C. Steamship Co.*, 78 Ill. 25; s. c.

21 Am. Rep. 2; *Hass v. P. & C. Steamship Co.*, 88 Pa. St. 269. See also *Shedd v. Moran*, 10 Brad. 618.

The fact that a foreman was, under certain circumstances, allowed to hire and discharge men, does not of itself make him the agent of the principal. *Hamilton v. Iron, &c., Co.*, 4 Mo. App. 564. Nor does the fact that one employee upon a railway is hired and discharged by one superior agent and another by another, affect the relation of the employees to each other as fellow-servants. *Slater v. Jewett*, 85 Ill. 61; s. o. 39 Am. Rep. 627. Where a railway company leases of another company its track, the trains of the lessee being allowed to run over such track, subject to the control, rules and orders of the lessor, by virtue of an agreement to that effect between the companies, the lessor will be regarded as the common master of the servants of the lessee, while running its trains on the leased track, and the employees of the two companies as fellow-servants of the lessor. *C., B. & Q. Ry. Co. v. Clark*, 2 Brad. 596.

In *Smith v. Flint, &c., Ry. Co.*, 46 Mich. 258, a brakeman in coupling cars had his arm crushed by a loosened dead-wood which had come from another road. It was the business of inspectors employed on both roads to see that cars transferred were in proper condition. *Held*, that the car inspector was a fellow-servant of the brakeman, and that the latter could not recover from the railway company.

A railway company is not liable for injuries inflicted through the negligence of its servants, upon a stranger to the company while engaged in the voluntary service of the company in uncoupling the cars, if by his negligence he contributed to the injury: *N. O. Ry. Co. v. Harrison*, 48 Miss. 112; s. o. 12 Am. Rep. 356; see *Flower v. Penn. R. R. Co.*, 69 Pa. St. 210; *Dagg v. Midland Ry. Co.*, 1 Hurlst. & N. 772.

In *Beilfus v. N. Y., &c., Ry. Co.*, 29

Hun 556, a sent out und was employe to superinten under the ord of the shops : were being re tate was kill car, which we and negligent that S. was a ceased, and t. responsible for

In *Howland* 54 Wis. 226, t as a shoveler c company, upon moving snow frœ by the overturr he rode, by re. attempt of the snow-bank from snow-plow alone tum of the train. by the plaintiff w that such overtur of the perils of assumed, and th others whose ne were fellow-serva ployment.

In *Searle v. Lin* 429, the plaintiff engineer on board while employed wi of the chief enginee. one of the handles quence of the machin. the negligence of the chief engineer, in a defective and unsafe condition, and the plaintiff was seriously injured. *Held*, that the owners were not liable.

Where the service of workmen is divided into different departments and each department committed to distinct bodies of workmen, an injury to a servant of one class resulting from the negligence of a servant in the other class, will entitle the servant injured to invoke the doctrine of *respondent superior*. But

where the different classes of work are committed to the whole body of workmen without regard to its character, they are fellow-servants, and the employer is not liable. Whether in any given case the two species of service form two departments, or one, is a question of fact for the jury. *Holton v. Daly*, 4 Brad. 25.

WHO ARE NOT FELLOW-SERVANTS.—

Whoever exercises the power of appointing and removing employees or servants, though his grade of employment as to other matters makes him their fellow-servant, exercises a corporate function and renders the corporation liable for his negligence. *Tyson v. S. & N. Al. Ry. Co.*, 61 Ala. 554. A superintendent who employs and discharges the laborers and employees is not a fellow-servant of theirs, but represents the master. *Mitchell v. Robinson*, 80 Ind. 281.

The following have been held not to be fellow-servants: A fireman and a master of a vessel. *The Classop*, 7 Sawyer C. C. 274. An employee in charge of a train, and an employee in the company's carpenter shop. *Ryan v. Chicago & North Western Ry. Co.*, 60 Ill. 171. A track repairer and a fireman. *C. & N. W. Ry. Co. v. Moranda*, 93 Ill. 302. Persons engaged in loading cars with freight and switch tender. *C., R. I., &c., Ry. v. Henry*, 7 Brad. 322. To the same effect is: *Whalon v. Centenary Church*, 62 Mo. 327; *Gornaly v. Vulcan Iron Works*, 61 Mo. 492; *Beeson v. Green Mt., &c., Ry. Co.*, 57 Cal. 20; *Walker v. Bolling*, 22 Ala. 294; *Devany v. Vulcan Iron Works*, 4 Mo. App. 236; *Devine v. Tarrytown, &c., Co.*, 22 Hun 26. Engineer of train carrying day laborers to work, and such laborers. *Russell v. Hudson R. Ry. Co.*, 5 Duer 89. But contra, *Ryan v. C. V. Ry. Co.*, 23 Pa. St. 384; *Gillshannon v. S. B. Ry. Co.*, 10 Cush. 228. A general foreman who has full charge and supervision of a work, who makes out the pay-roll,

engages and discharges men, and the laborers under him. *Eagan v. Tucker*, 18 Hun 347. To the same effect is: *Dowling v. Allen*, 74 Mo. 13; s. c. 41 Am. Rep. 298; *Schultz v. C. M., &c., Ry. Co.*, 48 Wis. 375; *Brabbits v. C. & N. W. Ry.*, 38 Id. 289. See note to *Mulone v. Hathaway*, 21 Am. Rep. 579; *Miller v. Union Pu. Ry.*, 17 Fed. R. 67; *Gravelle v. Minneapolis, &c., Ry. Co.*, 3 McCrary C. C. 352. A day laborer on the track of a railway, and an engine driver. *T. W., &c., Ry. Co. v. O'Connor*, 77 Ill. 391. A mining captain, having the entire management of the mine, and a laborer in the mine. *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35. Workmen employed by cotton manufacturing company to keep the machinery of the mill in repair, and a weaver in the factory. *Gunter v. Graniteville, &c., Company*, 18 S. C. 263.

The rule of *respondet superior* applies where an employee of a railway company is injured by reason of the negligence of another employee of the same company, engaged in a separate and distinct department, having no immediate connection with that in which the injured employee is engaged. *N., &c., Ry. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

In Ohio it is well settled that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of others, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable: *Berea Stone Co. v. Kraft*, 31 Ohio St. 292; *Railway Co. v. Stevens*, 20 Ohio 415; *C. C., &c., Ry. v. Keary*, 3 Ohio St. 201; *M. R., &c., Ry. v. Barber*, 5 Id. 541; *P. & Ft., &c., Ry. Co. v. Deviney*, 17 Id. 197. See also *Lake Shore, &c., Ry. Co. v. Lavalley*, 36 Ohio St. 221.

A section foreman, whose duty it is to keep the track in repair and free from obstructions, in this particular represents the company, and is not a fellow-servant with a switchman; *Hall v. Mo. Pacific Ry. Co.*, 74 Mo. 298. This rule was laid down in *Lewis v. Ry. Co.*, 59 Mo. 495, and has since been followed in the Missouri courts.

In *Abraham v. Reynolds*, 5 Hurlst. & N. 143, the plaintiff, a servant of J. & Co., who were employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when, in consequence of the negligence of defendants' porter in lowering the bales from the upper floor of the warehouse, a bale fell upon him. *Held*, that the plaintiff and defendants' servant not being under the same control, or forming part of the same establishment, were not so employed on a common object as to deprive the plaintiff of a right of action against the defendants for such negligence.

In *Baird v. Pettit*, 70 Pa. St. 447, the plaintiff was employed as a draftsman in the defendant's locomotive works. A carpenter employed in "jobbing" for defendant in any part of the warehouse, was by the direction of the defendant, superintending the excavation of a cellar under the building, employing hands, etc. He had a large pile of dirt thrown on the public walk. The plaintiff, in leaving the house in the dark after ceasing work, fell over the dirt and was injured. *Held*, that they were not fellow-servants and that the defendants were liable. *Held*, further, that the plaintiff having ceased work and left the shop, the relation of master and servant had ceased, and the defendant was liable to him as to any other citizen.

As to when employee deemed *alter ego* of master, see generally, *Foues v. Phillips*, 39 Ark. 17; *Hart v. N. Y., &c.*, *Dock Co.*, 48 Supr. Ct. 460; *Dwyer v. Am. Ex. Co.*, 55 Wis. 453; *Dobbin v. Ry. Co.*, 81 N. C. 447.

MODIFICATION OF THE GENERAL RULE.—To the general rule of law that the master is not responsible to one servant for an injury occasioned by the negligence of a co-servant of the common employer, there are two well-defined exceptions:

First.—Where the servant whose negligence caused the injury was an unfit and incompetent person to be intrusted with the duty to which he was assigned, and the accident resulted from his incompetency and unfitness; *Laning v. N. Y. Cent. Ry. Co.*, 49 N. Y. 521.

Second.—Where the accident resulted from unsafe and imperfect machinery, and appliances, furnished for the use of the servant in the master's business; *Laning v. N. Y. Cent. Ry. Co.*, *supra*; *Flike v. Boston & Alb. Ry. Co.*, 53 N. Y. 550; *Fuller v. Jewett*, 80 N. Y. 46.

These exceptions, however, are subject to the qualification that the duty imposed upon the master to furnish competent servants, and to furnish fit and safe machinery, is not absolute, but relative. The master does not guarantee either the competency of the co-servants or the safety of the machinery: *G. H., &c., Ry. Co. v. Delahunty*, 53 Tex. 206; *C. & N. W. Ry. Co. v. Scheuring*, 4 Brad. 533; *Slater v. Jewett*, 85 N. Y. 61; *C. & N. W. Ry. Co. v. Bragonier*, 11 Brad. 517; *Buckley v. Gould, &c., Co.*, 8 Sawy. C. C. 395; s. c. 14 Fed. R. 833. He undertakes to use due and reasonable care in both respects: *Murphy v. Boston, &c., Ry. Co.*, 88 N. Y. 146; *Kain v. Smith*, 25 Han 146; *Lambert v. Pickel*, 4 Mo. App. 590; *Colton v. Richards*, 123 Mass. 484; *Ala. & Fla. Ry. Co. v. Walker*, 48 Ala. 460; *Tyson v. S. & N. A. Ry. Co.*, 61 Ala. 554; *McDonald v. Hazletine*, 53 Cal. 35; *H. & T. C. Ry. v. Meyers*, 55 Tex. 110; *Currow v. Merchants' Manufacturing Co.*, 135 Mass. 374; *King v. Ohio, &c., Ry. Co.*, 14 Fed. Rep. 277.

DUTY OF MASTER GENERALLY.—The duty of the master to the servant, or

his implied contract with his servant, is admirably described by FOLGER, J., in *Laning v. N. Y. Cent. Ry.*, 49 N. Y. 532. Said he: "That duty or contract is to the result that the servant shall be under no risk from imperfect or inadequate machinery, or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively performed, and there is not a performance of it until there has been placed for the servant's use, perfect and adequate physical means, and for his helpmates fit and competent fellow-servants; or due care used to that end. That some general agent clothed with the power, and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance,—when it is done, and not till then, is his duty met or his contract kept. The servant here takes the risk of the negligence of his fellows in the use of the materials and implements furnished, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. * * * * The principals may not avoid the duty which they owe to their servants of furnishing them with sound mechanical contrivances, and accompanying them with competent fellows, by conferring upon superior servants the duty of selecting and hiring. The duty being that of the principals, and theirs the contract, it is theirs to fulfil and perform, and if it is not done, or insufficiently done, the failure to do so is theirs. As is well said, 'if a master's knowledge of defects be unnecessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable.' (BYLES, J., in *Holmes v. Clark*, W. R. 405)."

The fact that a servant became negligent after he had been employed, does not, without other evidence, show negli-

gence in the master in selecting. *McDonald v. The Eagle, &c., Co.*, 67 Ga. 761; s. c. 68 Ga. 839. See generally as to the duty of master, *Drymala v. Thompson et al.*, 26 Minn. 40; *Railway Co. v. Dunham*, 49 Texas 181; *Blake v. Me. Cent. Ry. Co.*, 70 Me. 60; *Jordan v. Wells*, 8 Woods 527; *Tex. M. R. Co. v. Whitmore*, 58 Tex. 276; *Jones v. Mills*, 126 Mass. 84; *Lawler v. Androscoggin Ry. Co.*, 62 Me. 463; 16 Am. R. 492; *O'Connell v. B. & O. Ry. Co.*, 20 Md. 212; *Shauck v. N. C. Ry. Co.*, 25 Id. 462; *Smith v. Steele*, L. R., 10 Q. B. 125; 11 Eng. R. 194; *Howd v. Miss. Cent. Ry. Co.*, 50 Miss. 178.

If the negligence of a railway company is the efficient cause of the injury, it is liable, although the servant may have been himself in some default, and might have escaped injury by the exercise of extraordinary care. *N., &c., Ry. Co. v. Carroll*, 6 Heisk. (Tenn.) 348.

A railway company cannot contract in advance with its employees for the waiver and release of the liability imposed. *Kan. Pa. Ry. v. Peavey*, 29 Kan. 169; s. c. 44 Am. R. 630.

Where a servant engaged in the operation of machinery, by reason of his youth and inexperience, is not aware of the danger to which he is exposed, it is the duty of his master to warn him if he himself knows of it, and this notwithstanding the existence of that which renders the machinery dangerous is known to the servant. *Dowling v. Allen*, 74 Mo. 13. See also *Hamilton v. G., H., &c., Ry.*, 54 Tex. 556.

DUTY OF THE MASTER TO SELECT AND RETAIN COMPETENT FELLOW-SERVANTS.—If the master is guilty of negligence in the employment of a fellow-servant, or, after notice, continuing in his employment an incompetent servant, he is liable. *Ohio & Mississippi Ry. Co. v. Collarn*, 73 Ind. 261; *Marshall v. Shrickler*, 63 Mo. 309; *McAndrew v. Burns*, 39 N. J. 117; *Walker v. Bolling*,

22 Ala. 294; *Frazier v. Penn. Ry.*, 38 Pa. St. 104; *Pittsbg., &c., Ry. Co. v. Ruby*, 38 Ind. 294; *McDermott v. Boston*, 133 Mass. 349; *H. & T., &c., Ry. v. Willis*, 53 Tex. 318.

As to what is sufficient evidence of the competency of a servant, see *Gibson v. N. C. Ry. Co.*, 22 Hun 288; *Harvey v. N. Y. Cent. Ry. Co.*, 88 N. Y. 481; *Fones v. Phillips*, 39 Ark. 17; *Murphy v. St. L., &c., Ry.*, 71 Mo. 202.

A master is liable for his negligence in failing to furnish a sufficient number of servants to insure safety. *Hardy v. Cent. Ry.*, 76 N. C. 5.

Permission given by a railway company to an engineer to allow a fireman to act as engineer when competent, makes the company liable for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty. *Harper v. Wood*, 47 Mo. 567; 14 Am. R. 353. See also *Ohio & Miss. Ry. v. Collarn*, 73 Ind. 261.

Where a conductor is habitually intemperate and unfit for service, and his habits and unfitness are known to the railway company, it is liable to his fellow-servants for his negligence. *Huntingdon, &c., Ry. Co. v. Decker*, 84 Ill. 419.

As to the liability of connecting lines of railway to employee, see *Phil., &c., Ry. Co. v. State*, 58 Md. 373.

DUTY OF MASTER TO FURNISH SAFE MACHINERY.—A master must provide his servants with safe and suitable machinery and appliances necessary for their work, and must also keep them in repair. *Laning v. N. Y. Cent. Ry.*, 40 N. Y. 521; *Flike v. B. & A. Ry.*, 53 N. Y. 550; *Lasure v. Graniteville, &c., Ry. Co.*, 18 S. C. 296; *Cowles v. Ry. Co.*, 84 N. C. 309; *Noyes v. Smith*, 28 Vt. 59; *Gallagher v. Piper*, 16 C. B. (N. S.) 669; *Mulchey v. Methodist R. S.*, 125 Mass. 487; *Green v. Banta*, 48 N. Y. Supr. Ct. 156.

The fact that an employee was killed in consequence of defective machinery, will not of itself make out a case against his employer. It must be shown that the employer was aware of the defect, or that by reasonable care it could have been discovered. *Elliott v. St. L., &c., Ry.*, 67 Mo. 272.

The master is liable for defective machinery, although the negligence of a fellow-servant contributed to the injury. *McMahon v. Henning*, 1 McCrary 516; *Kain v. Smith*, 25 Kan. 146; *Cone v. Del., &c., Ry.*, 81 N. Y. 206.

If the master has provided suitable material and machinery, he is not liable for the negligence or error in judgment of any of the servants in selecting and using them, provided they are of adequate skill and careful, prudent persons. *Harms v. Sullivan*, 1 Brad. 251; *Holden v. Fitchburg Ry. Co.*, 129 Mass. 268; *Marvin v. Muller*, 25 Hun 163; *Floyd v. Sugden*, 134 Mass. 563; *Collins v. St. P., &c., Ry.*, 30 Minn. 31.

DUTY OF SERVANT.—A servant must not have been guilty of negligence in order to recover. *McDade v. Ga. Ry. Co.*, 60 Ga. 119; *Cowles v. Ry. Co.*, 84 N. C. 309; *Kenney v. Cent. Ry.*, 61 Ga. 590; *Day v. Toledo, &c., Ry.*, 42 Mich. 523. If the employee have knowledge of imperfect machinery and continues using it, he cannot recover. *H. & T. C. Ry. v. Myers*, 55 Tex. 110. And if he have knowledge of an habitual and continued negligence of his employer and acquiesces therein, and continues in his service without objection or effort to correct it, he waives his rights. *Ry. Co. v. Knittel*, 33 Ohio St. 468; *Frazier v. Penn. Ry. Co.*, 38 Pa. St. 104.

It is the duty of the servant to give notice of a defect in machinery, or of the incompetency of a fellow-servant, if he have knowledge of either. *Cowles v. Railway Co.*, *supra*; But where the employee is so grossly and notoriously unfit that not to know of his unfitness is

negligence, the law presumes notice to the employer. *C. & R. I. Ry. Co. v. Doyle*, 18 Kan. 59.

An employee must make reasonable use of his faculties to avoid danger or injury in the course of his employment. *Hughes v. Winona, &c., Ry.*, 27 Minn.

137. And if he voluntarily exposes himself to danger that he knows, or by reasonable attention might know, he assumes all risks thereto. *Chicago & T. Ry. v. Simmons*, 11 Brad. 147.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of Massachusetts.

COMMONWEALTH v. FRANKLIN PIERCE.

To constitute manslaughter where there is no evil intent it is not necessary that the killing should be the result of an unlawful act; it is sufficient if it is the result of reckless or foolhardy presumption, judged by the standard of what would be reckless in a man of ordinary prudence under the same circumstances.

The defendant, who publicly practised as a physician, being called upon to attend a sick woman, caused her with her consent to be kept in flannels saturated with kerosene for three days, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh, as in the present case. Held, that the jury having found that the application was made as the result of foolhardy presumption or gross negligence, a conviction of manslaughter was proper.

Commonwealth v. Thompson, 6 Mass. 134, criticised.

THE facts of this case are sufficiently stated in the opinion of the court, which was delivered by

HOLMES, J.—The defendant has been found guilty of manslaughter on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court, and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have "so much knowledge or probable information of the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness, and not of an honest intent and expectation to cure." The seventh request assumes the law to be as thus stated. The sixth request

was as follows: "If the defendant made the prescription with an honest purpose and intent to cure the deceased, he is not guilty of this offence, however gross his ignorance of the quality and tendency of the remedy prescribed, or of the nature of the disease, or of both." The eleventh request was substantially similar, except that it was confined to this indictment.

The court instructed the jury that "it is not necessary to show an evil intent;" that "if by gross and reckless negligence he caused the death, he is guilty of culpable homicide;" that "the question is whether the kerosene (if it was the cause of the death), either in its original application, renewal, or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant;" and that the defendant was "to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it." In other words, that the defendant's duty was not enhanced by any express or implied contract, but that he was bound at his peril to do no grossly reckless act when he intermeddled with the person of another, in the absence of any emergency or other exceptional circumstances.

The defendant relies on the case of *Commonwealth v. Thompson*, 6 Mass. 134, from which his fifth request is quoted in terms. His argument is based on another quotation from the same opinion: "To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription." This language is ambiguous, and we must begin by disposing of a doubt to which it might give rise. If it means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully, and latterly, we may add, much more willingly, recognised that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful for independent reasons, from which death accidentally ensues: 3 Inst. 57; 1 Hale P. C. 472-477; 1 Hawk. P. C. c. 29, §§ 3, 4, 12; c. 31, §§ 4-6; Foster 262, 263, *Homicide*, c. 1, § 4; Bl. Comm. 192,

197; 1 East P. C. 260 *et seq.*; *Hull's Case*, Kelyng 40, and cases cited below.

But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one, or everybody, else might be led to anticipate or apprehend them if the supposed act were done. We have to determine whether recklessness in this sense was necessary to make the defendant guilty of felonious homicide, or whether his acts are to be judged by the external standard of what would be morally reckless under the circumstances known to him in a man of reasonable prudence.

More specifically, the questions raised by the foregoing requests and rulings are whether an actual good intent and the expectation of good results are an absolute justification of acts, however foolhardy they may be, if judged by the external standard supposed, and whether the defendant's ignorance of the tendencies of kerosene administered as it was will excuse the administration of it.

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be negligent in a man of ordinary prudence, it is negligent in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of TINDAL, C. J., "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe:" *Vaughan v. Menlove*, 4 Bing. N. C. 468, 475; s. c. 4 Scott 244.

If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least

equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all.

There is no denying, however, that *Commonwealth v. Thompson*, although possibly distinguishable from the present case upon the evidence, tends very strongly to limit criminal liability more narrowly than the instructions given. But it is to be observed that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord HALE, 1 P. C. 429, to the effect "that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, he is not guilty of murder or manslaughter:" 6 Mass. 141. We think that the court fell into the mistake of taking Lord HALE too literally. Lord HALE himself admitted that other persons might make themselves liable by reckless conduct: 1 P. C. 472. We doubt if he meant to deny that a physician might do so as well as any one else. He has not been so understood in later times: *Rex v. Long*, 4 C. & P. 423, 436; *Webb's Case*, 2 Lewin 196, 211. His text is simply an abridgment of 4 Inst. 251. Lord COKE there cites the Mirror, c. 4, § 16, with seeming approval, in favor of the liability. The case cited by HALE does not deny it: Fitz. Abr. *Corone*, pl. 163. Another case of the same reign seems to recognise it. Y. B. 43 Ed. III. 33, pl. 38, where Thorp said that he had seen one indicted for killing a man, whom he had undertaken to cure, by want of care. And a multitude of modern cases have settled the law accordingly in England: *Rex v. Williamson*, 3 C. & P. 635; *Tessymond's Case*, 1 Lewin 169; *Ferguson's Case*, Id. 181; *Rex v. Simpson*, Willcock Med. Prof., part 2, ccxxvii.; *Rex v. Long*, 4 C. & P. 398; *Rex v. Long*, Id. 423; *Rex v. Spiller*, 5 C. & P. 333; *Rex v. Senior*, 1 Moody 346; *Webb's Case*, 2 Lewin 196; s. c. 1 M. & Rob. 405; *The Queen v. Spilling*, 2 Id. 107; *Regina v. Whitehead*, 3 C. & K. 202; *Regina v. Crick*, 1 F. & F. 356; *Regina v. Crook*, Id. 521; *Regina v. Markuss*, 4 Id. 356; *Regina v. Chamberlain*, 10 Cox C. C. 486; *Regina v. Maclead*, 12 Id. 534. See also *Ann v. State*, 11 Humph. 159; *State v. Hardister*, 38 Ark. 605; and the Massachusetts cases cited below.

If a physician is not less liable for reckless conduct than other

people, the matter is clear in the light of admitted principle and the later Massachusetts cases. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor. The only difference is, that the latter inquiry is still more obviously external to the estimate formed by the actor personally than the former. But it is familiar law that an act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder: *Commonwealth v. Drew*, 4 Mass. 391, 396; *Commonwealth v. Fox*, 7 Gray 585. The doctrine is clearly stated in 1 East P. C. 262.

The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious.

As implied malice signifies the highest degree of danger, and makes the act murder; so, if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter, as in the case of an ordinary assault with feet and hands, or a weapon not deadly, upon a well person. Cases of *Drew* and *Fox*, *ubi supra*. Or firing a pistol into the highway, when it does not amount to murder: *Burton's Case*, 1 Strange 487. Or slinging a cask over the highway in a customary, but insufficient mode: *Rigmaidon's Case*, 1 Lewin 180. See *Hull's Case*, Kelyng 40. Or careless driving: *Regina v. Timmins*, 7 C. & P. 499; *Regina v. Dalloway*, 2 Cox C. C. 273; *Regina v. Swindall*, 2 C. & K. 230.

If the principle which has thus been established both for murder and manslaughter is adhered to, the defendant's intention to produce the opposite result from that which came to pass, leaves him in the same position with regard to the present charge that he

would have been in if he had had no intention at all in the matter. We think that the principle must be adhered to, where, as here, the assumption to act as a physician was uncalled for by any sudden emergency, and no exceptional circumstances are shown; and that we cannot recognise a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.

We have implied, however, in what we have said, that it is undoubtedly true, as a general proposition, that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown. And it may be asked why the dangerous character of kerosene, or "the fatal tendency of the prescription," as it was put in the fifth request, is not one of the circumstances the defendant's knowledge or ignorance of which might have a most important bearing on his guilt or innocence.

But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that, if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it, and who had no warning, would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. And therefore, again, if the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, which seems to have been the view of the common law with regard to bulls, for instance, a person to be made liable must have notice of some past experience, or, as is commonly said, "of the quality of the beast." 1 Hale P. C. 430. But if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril. When the jury are asked whether a stick of a certain size

was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was: *Commonwealth v. Drew*, *ubi supra*; *Commonwealth v. Webster*, 5 Cush. 295, 306. So as to an assault and battery by the use of excessive force: *Commonwealth v. Randall*, 4 Gray 36. So here. The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough: *Commonwealth v. Stratton*, 114 Mass. 303, 305. Indeed, if the defendant had known the fatal tendency of the prescription, he would have been perilously near the line of murder: *Regina v. Packard*, C. & M. 236. It will not be necessary to invoke the authority of those exceptional decisions in which it has been held, with regard to knowledge of the circumstances, as distinguished from foresight of the consequences of an act, that, when certain of the circumstances were known, the party was bound at his peril to inquire as to the others, although not of a nature to be necessarily inferred from what were known: *Commonwealth v. Hallett*, 103 Mass. 452; *Regina v. Prince*, L. R., 2 C. C. 154; *Commonwealth v. Farren*, 9 Allen 489.

The remaining questions may be disposed of more shortly. When the defendant applied kerosene to the person of the deceased in a way which the jury have found to be reckless, or, in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify by her consent, and which therefore was an assault notwithstanding that consent: *Commonwealth v. Collberg*, 119 Mass. 350; see *Commonwealth v. Mink*, 123 Mass. 422, 425. It is unnecessary to rely on the principle of *Commonwealth v. Stratton*, 114 Mass. 303, that fraud may destroy the effect of consent, although evidently the consent in this case was based on the express or implied representations of the defendant concerning his experience.

As we have intimated above, an allegation that the defendant knew of the deadly tendency of the kerosene was not only unnecessary, but improper: *Regina v. Packard*, *ubi supra*. An allegation that the kerosene was of a dangerous tendency is superfluous, although similar allegations are often inserted in indictments, it being enough to allege the assault and that death did in fact result from it. It would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with expos-

ure. See *Commonwealth v. Macloon*, 101 Mass. 1. See further the second count, for causing death by exposure, in *Stockdale's Case*, 2 Lewin 220; *Regina v. Smith*, 11 Cox C. C. 210. The instructions to the jury on the standard of skill by which the defendant was to be tried, stated above, were as favorable to him as he could ask.

The objection to evidence of the defendant's previous unfavorable experience of the use of kerosene is not pressed. The admission of it in rebuttal was a matter of discretion: *Commonwealth v. Blair*, 126 Mass. 40.

Exceptions overruled.

Mr. Bishop, in his excellent work on Criminal Law, vol. 1, § 314 (7th ed.), lays down the rule as to homicide from carelessness, thus:

"Every act of gross carelessness, even in the performance of what is lawful, and *à fortiori* of what is not lawful, and every negligent omission of legal duty, whereby death ensues, is indictable either as murder or manslaughter:" *Rex v. Carr*, 8 C. & P. 163; *Reg. v. Haines*, 2 C. & K. 368; *Rex v. Sullivan*, 7 C. & P. 641; *Errington's Case*, 2 Lewin 217; *Reg. v. Edwards*, 8 C. & P. 611; *Ann v. State*, 11 Humph. 159; *U. S. v. Freeman*, 4 Mason 505; *Castell v. Bambridge*, 2 Stra. 856; *Rex v. Fray*, 1 East P. C. 236; *Reg. v. Marriott*, 8 C. P. 425; *U. S. v. Warner*, 4 McLean 463; *Rex v. Smith*, 2 C. & P. 449; 1 East P. C. 264, 331; *Hilton's Case*, 2 Lewin 214; *Reg. v. Barrett*, 2 C. & K. 343; *State v. Hoover*, 4 Dev. & Bat. 365; *Reg. v. Ellis*, 2 C. & K. 470; *Etcherry v. Leville*, 2 Hilton 40; *State v. O'Brien*, 3 Vroom 169; *Reg. v. Martin*, 11 Cox C. C. 136.

"If a man take upon himself an office or duty requiring skill or care—if, by his ignorance, carelessness or negligence, he cause the death of another, he will be guilty of manslaughter. * * * If a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and if he

cause the death of another through a gross want of either, he will be guilty of manslaughter:" 1 Arch. Cr. Pr. & Plead. *9, quoted by Mr. Bishop, 1 Bish. Cr. Law, § 314; *Reg. v. Spiller*, 5 C. & P. 333; *Reg. v. Van Butchell*, 3 Id. 629; *Reg. v. Williamson*, Id. 635; *Reg. v. St. John Long*, 4 Id. 398, 423; *Rex v. Webb*, 1 Moody & R. 405.

In vol. 2 of his work on Criminal Law, § 664, Mr. Bishop says:

"The doctrine as to physician and patient is not quite the same in England and the United States, and possibly it is not harmonious among our states. According to English adjudication, whenever one undertakes to cure another of disease, or to perform on him a surgical operation, he renders himself thereby liable to the criminal law, if he does not carry to this duty some degree of skill, though what degree may not be clear; consequently, if the patient dies through his ill treatment, he is indictable for manslaughter:" *Rex v. Spiller*, 5 C. & P. 333; *Ferguson's Case*, 1 Lewin 181; *Rex v. Senior*, 1 Moody 346; *Rex v. Webb*, 1 Moody & R. 405; 2 Lewin 196; *Reg. v. Spilling*, 2 Moody & R. 107; *Rex v. Long*, 4 C. & P. 398; *Reg. v. Williamson*, 3 C. & P. 635; *Reg. v. Markus*, 4 Fost. & F. 356; *Reg. v. Macleod*, 12 Cox C. C. 534; *Reg. v. Chamberlain*, 10 Id. 486; *Regina v. Spencer*, Id. 525. "Still [says Mr. Bishop in the same section], WILLES,

J., once put the doctrine in a more reasonable way, thus: 'If a man *knew* that he was using medicines beyond his knowledge, and was meddling with things beyond his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicine was guilty of gross negligence.' " *Reg. v. Markess*, 4 Fost. & Fin. 356, 359. Mr. Bishop then very characteristically and somewhat dogmatically observes: "Now, in the facts of human life, the less a man understands of anything occult, like the unseen workings of medicine, the more confident he is that his knowledge of the thing is perfect. Therefore, some of our American courts have laid down the doctrine, not altogether inharmoniously with this utterance of the learned English judge, in substance, that, since it is lawful and commendable for one to cure another, if he undertakes this office in good faith, and adopts the treatment he deems best, he is not liable to be adjudged a felon, though the treatment should be erroneous, and, in the eyes of those who assume to know all about this subject, which in truth is understood by no mortal, grossly wrong; and though he is a person called by those who deem themselves wise, grossly ignorant of medicine and surgery." 2 Bish. Cr. Law, § 664, citing *Commonwealth v. Thompson*, 6 Mass. 134; and *Rice v. State*, 8 Mo. 561.

We have quoted thus largely from Mr. Bishop's excellent book, because we believe that in thus dogmatizing concerning the lack of knowledge of their profession by those following the sister profession of medicine and surgery he has himself erred through insufficient knowledge of that profession. "If a man *knew* that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was [indeed] culpable rashness."

But it does not appear that Mr. Justice WILLES, in the case from which the above quotation was made, which was from a charge to the jury at the Durham Assizes, 1864, intended to say that this was the only kind of culpable rashness. It seems, on the other hand, that this was merely an illustration; for he immediately adds: "Negligence might consist in using medicines in the use of which care was required," &c. See *supra*. That it was merely an illustration is further apparent from the fact that immediately thereafter he adds another illustration: "If a man were wounded, and another applied to his wound sulphuric acid, or something which was of a dangerous nature and ought not to be applied and which led to fatal results, then the person who applied this remedy would be answerable, and not the person who inflicted the wound, because a new cause had intervened." In the beginning of his charge the learned judge very properly said: "Every person who dealt with the health of others dealt with their lives, and every person who so dealt was bound to use reasonable care and not to be grossly negligent. * * * Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness and without skill in his profession, used such a dangerous medicine, acted with gross negligence." The drug given in this case, and which caused death, was a tablespoonful of a tincture of colchicum seeds, containing eighty grains of the seeds, eighteen grains, as is said in the case, being a fatal dose.

In *Nanny Simpson's Case*, 1 Lewin 172, 262, the prisoner was indicted for manslaughter in having caused the death of a man by administering *white vitriol* as a medicine. BAILEY, J.: "I am

clear that if a person not having a medical education and in a place where persons of a medical education might be obtained takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter. The party may not mean to cause death; on the contrary, he may mean to produce beneficial effects; but he has no right to hazard medicine of a dangerous tendency, where medical assistance can be obtained. If he does, he does it at his peril." See also *Tassymond's Case*, 1 Lewin 169, where the prisoner was convicted of manslaughter in causing the death of an infant by negligently selling laudanum for paregoric.

It may be conceded that the cases of *Commonwealth v. Thompson*, 6 Mass. 134 (decided in 1809); and *Rice v. State*, 8 Mo. 561 (decided in 1844), in the former of which the law of the case is contained in Chief Justice PARSONS'S charge to the jury that tried the prisoner, and the latter of which is apparently decided mainly upon the authority of the former, seem to lay down the rule that in order to warrant a conviction for murder or manslaughter, the defendant must have some knowledge of the fatal tendency of the prescription. An attentive perusal of these cases cannot fail, as it seems to us, to convince the reader that there was a palpable failure of justice in both cases.

In the case of *Commonwealth v. Thompson*, the defendant gave to the patient suffering with a cold, powdered lobelia, and persisted in giving it to him for a

period of eight days till he was so completely exhausted that no relief could be afforded, and he died of exhaustion. In *Rice v. The State* the defendant was employed by the husband of a woman near the end of the eighth month of pregnancy, to cure her of "sciatica;" and, after having been informed of her condition and that other physicians had cautioned against the use of vapor baths and emetics in her then condition, he commenced a course of treatment by steaming and giving lobelia, and persisted in this treatment till she had a premature delivery, a few days after which she died. The evidence showed that she had been married five years, and during that time had had three children, always doing well after a birth, and was in better health when the defendant commenced his practice on her than she had been for many years.

It seems unnecessary to multiply cases to show that the foregoing two cases are erroneous. The court in the principal case has, we think, shown it conclusively; and the passages quoted at the head of this note from Bishop and Archibald on Criminal Law, with the authorities there cited, lay down the rule that ought to govern such cases. The court in the principal case has carefully limited the application of the rule there laid down to cases where there was no sudden emergency and where no exceptional circumstances were shown, and thus limited, the rule of the case seems eminently reasonable, and grounded on the soundest views of public policy.

M. D. EWELL.

Chicago.

Supreme Court of Pennsylvania.

LIENBACH v. TEMPLIN.

Goods purchased by a married woman on credit are not separate property ; her credit is nothing in the eye of the law.

A married woman cannot acquire title to any property or business upon the credit of its after-production.

Where a wife claims property as against her husband's creditors, she must show affirmatively, by clear, and full proof, that she paid for it with her own separate funds.

ERROR to the Court of Common Pleas of Berks County.

This was a feigned issue between an execution creditor and the wife of the execution debtor to determine the ownership of personal property levied upon. The facts were that in 1877 the husband, Levi Templin, was indebted to Amos Rothermel and others, and informed Rothermel that he could not meet his notes. After some consultation Rothermel, on December 18th 1877, agreed to purchase certain property of Templin's, then in the hands of the sheriff for the amount of his claim. This he did, and received a bill of sale. The following forenoon this property was sold to the wife, Levina Templin, and she agreed to pay for it at the rate of fifty dollars per month. She made the last payment February 14th 1879. After the bill of sale had been made Levi Templin made an assignment of his real and personal property for the benefit of creditors. He made claim for the benefit of the three hundred dollars which the laws permit an insolvent debtor to make. The household goods were appraised at about one hundred and eleven dollars, and the balance to make up the three hundred dollars was paid to him in money out of the sale of real estate. Levi Templin as well as his wife, testified that this property and this money, after he obtained possession of it, was by him given to his wife. On August 10th 1880 Mrs. Templin applied for and was allowed the benefit of the Act of April 3d 1872, securing to married women their separate earnings. On September 20th 1880 the present execution was levied.

The opinion of the court was delivered by

CLARK, J.—The act of 1848 provides in very clear terms that property of whatsoever kind or nature, which shall accrue to a married woman during coverture, “shall be” owned and enjoyed by her as her own separate property, “and shall not be subject to levy and execution for the debts and liabilities of her husband.” It is her “pro-

perty" only, however, that the legislature intended to protect; her earnings, her efforts and her credit are her husband's, since the Act of 1848, as before. What she may be said to acquire, as the result of her skill and industry, on her merely personal credit, accrues to the husband, and, as to the creditors, is to be taken as his: *Raybold v. Raybold*, 8 Harris 311; *Bucher v. Ream*, 18 P. F. Smith 420.

Goods purchased by a married woman on her own credit are not her separate property: *Robinson v. Wallace*, 3 Wright 133. Her credit is nothing in the eyes of the law; when she does contract, the law esteems her the agent of her husband: *Keugh v. Jones*, 8 Casey 432; *Holland v. Horter*, 11 Id. 375. A married woman must have a separate estate to protect her purchase upon credit. An estate available and proportionate to the credit it supports. The purchase must in fact be made, not upon her credit, but upon the credit of her separate estate; upon her ability to pay out of her own funds: *Gault v. Sylvis*, 8 Wright 307.

The ownership of the corpus of an estate, real or personal, gives title to its income and profits. The title to land gives title to its products, no matter whose labor may have been expended in the production: *Rush v. Voight*, 55 Penn. St. 442; *Mussel v. Gardner*, 66 Id. 247. But a married woman cannot acquire title to land upon the credit of its after-production, nor to any property or business upon its prospective profits. The production and profits are, in general, the result of the labor of the husband and wife, or their children, and whilst creditors have no claim on the husband's labor or that of his family, as such, yet, when that labor acquires title to property, they may have a claim upon the property thus acquired. When the estate is hers, the production is hers; the labor expended in realizing income cannot affect the title to either.

It is admitted that Mrs. Templin had no separate estate; the purchase of the property was made on her credit alone; the business was conducted with the property thus purchased, and the property was paid for out of the earnings of the business. We may accept the verdict of the jury, under the charge of the court, as a finding that the transaction was *bona fide*, and was not a device to save it from Templin's creditors; but, assuming this, the property was not the property of Mrs. Templin; her credit, under the circumstances, was her husband's credit, and the earnings of the business was the husband's money; it follows, that the property involved in the transaction of 18th of December, 1877, was as respects his creditors, the husband's property.

It was, of course, competent for Templin, so far as the transaction affected himself only, to place the title and ownership in his wife, not only of that embraced in the agreement of 18th of December, 1878, but of that also which he had taken under the exemption law. A husband may freely bestow his goods upon his wife or upon any other person, but he must be just to his creditors before he can afford to be generous to his friends. The rights of creditors rise superior to claims, which are founded on no valuable consideration.

Nor can we discover how the petition and decree of 10th of August, 1880, which secured to Mrs. Templin the rights of a *feme sole* trader, could, without more, have any effect upon the determination of this case. It is true that a portion of the property embraced in the sheriff's levy was purchased after the date of this decree; but with whose funds was the purchase made? It has not been shown that the purchase was made with the moneys of the wife; where a wife claims property, as against her husband's creditors, she must show affirmatively, by clear and full proof, that she paid for it with her own separate funds: *Keeney v. Good*, 9 Harris 355; *Gamber v. Gamber*, 6 Id. 366. She must make it clearly appear that the means of acquisition were her own, independently of her husband: *Auble, Adm'r. v. Mason*, 35 Penn. St. 262.

The fact that Mrs. Templin at the time of the purchase of the cattle and hogs, possessed the privileges and exercised the rights of a *feme sole* trader, does not dispense with the production of this measure of proof. It was not the intention of the legislature to dispense with the presumptions which ordinarily and of necessity arise in favor of creditors in transactions between husband and wife, affecting the ownership of property in the wife's name. The act of 3d of April, 1872, P. L. 35, provides merely that the separate earnings of any married woman, however realized, shall accrue to and inure to her separate benefit and use, and be under her exclusive control, as if she were *feme sole*, and not be liable to any claim of the husband or his creditors. The act further provides: "That in any suit at law, or in equity, in which the ownership of such property shall be in dispute, the person claiming such property, under this act, shall be compelled, in the first instance, to show title and ownership in the same."

In this case no such proof was made; the purchase-money was supplied from the earnings of the business; but the business, as we have already seen, belonged to the husband, and its earnings were his.

For the reasons stated, therefore, we are of opinion that the
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several assignments of error are sustained, and the judgment is reversed, and a *venire facias de novo* awarded.

This case holds that a married woman without a separate estate cannot purchase on credit, because at common law her credit is his credit, and the enabling statutes did not change the common law in this respect.

This is a question of general interest under the enabling statutes, and the weight of authority is not in favor of the Pennsylvania rule.

None of the state statutes, except one or two, confer more power than the Pennsylvania statute, which provides, amongst other things, as to the point involved, that all property coming to a married woman during coverture by will, descent, deed of conveyance or otherwise, shall be her separate estate: Kelly on Contracts of Married Women 289-544.

In all the states except California, Nevada and Louisiana, the common-law and equity doctrines prevailed before the enactment of the enabling statutes. Under the common law a married woman could not make a contract binding on her person, but she could contract in equity concerning her separate estate. Hence the common-law and equity doctrines prevail, except in so far as abrogated by these enabling statutes.

There is no controversy in any of the states upon the proposition that where a married woman is possessed of a separate estate, she can contract in such a way with respect to that estate as to make that estate the debtor. But there is considerable difference as to the details, and the application of this proposition, as well as in the application of what is generally known as the American and English rules: Kelly Cont. M. W., ch. 8.

The American rule is the converse of the English rule. As to the point involved, the former holds that a married woman can make no contract and has no power but such as is granted by the

statute, or the instrument creating the separate estate, or necessarily implied therefrom. The English rule holds that, unless restrained by the instrument (statute), she is a feme sole with respect to her separate estate and all her contracts, respecting the same, including her bond, bill, note, or other obligation, are binding on that estate: Kelly Cont. M. W. 251, *et seq.*

The states of Pennsylvania, South Carolina, Tennessee, Mississippi, Rhode Island and North Carolina, follow the American rule, whilst all the other states, except those deriving their jurisprudence from the civil law, adopt, in the main, the English doctrine, with little or no exception: Kelly Cont. M. W., 259.

In Pennsylvania (following the American rule) if the wife is possessed of a separate estate she can purchase on credit, and the property so acquired will be her separate estate and be protected from her husband's creditors: *Silveus v. Porter*, 24 P. F. S. 448; *Wieman v. Anderson*, 6 Wr. 311; *Kepler v. Davis*, 30 P. F. S. 153; *Bucher v. Ream*, 18 Id. 421; *Seeds v. Kahler*, 26 Id. 262; *Rush v. Fought*, 5 Id. 437. Even if the property so purchased be merchandise to be used in trade. *Wieman v. Anderson*, *supra*; *Welch v. Kline*, 7 P. F. Smith 428; or other property: *Conrad v. Shome*, 8 Wr. 193; and the products thereof, even if acquired by the assistance of her husband: *Musser v. Gardner*, 16 P. F. Smith 242. But as held in the principal case, in accord with the former adjudications, if she has no separate estate she cannot purchase on credit, for the reason that if she, without having a separate estate, purchase on credit, she must pay for it (1) out of her earnings, (2) her savings, or (3) out of the profits or products of the property purchased, which in any case is the result of her labor or the joint labor of her husband and her-

self or family, and this, at common law, belongs to the husband, and has not been changed by the statute: *Robinson v. Wallace*, 3 Wr. 129; *Bucher v. Ream*, 18 P. F. Smith 421; *Speakman's Appeal*, 21 Id. 25; *Hallowell v. Horter*, 11 Casey 375; *Brown v. Pendleton*, 10 P. F. Smith 419. Yet the same court held her purchase on credit good against the husband and his heirs although not good against his creditors: *Goff v. Nuttall*, 8 Wr. 78; *Bawser v. Bawser*, 1 Norris 57; *Patterson v. Robinson*, 1 Casey 81. And in the latter case her judgment for the purchase-money was enforced against the property purchased, although regarded invalid as a personal obligation: *Brauer's Appeal*, 11 Wr. 67; *Patterson v. Robinson*, 1 Casey 81; *Ramborger v. Ingraham*, 2 Wr. 146; *Heacock v. Fly*, 2 Harris 542; *Conrad v. Shomo*, 8 Wr. 193, and the reasoning in *Manderbach v. Mock*, 5 Casey 43.

Inasmuch as the Pennsylvania statute makes all property separate estate, which the wife acquires by will, descent, deed, or otherwise, her purchase on credit when paid for by money acquired otherwise than from her husband ought to be held valid, because, as the law stood before the enactment of the statute, she had, with her husband's assent, capacity to purchase on credit and to receive any kind of property: *Baxter v. Smith*, 6 Binn. 427; *Walker v. Coover*, 15 P. F. Smith 433; *Cowton v. Wickersham*, 4 Id. 302; *Winch v. James*, 18 Id. 297; *Hileman v. Bouslaugh*, 1 Harris 355; *Bortz v. Bortz*, 12 Wr. 382; *Vance v. Nogle*, 20 P. F. Smith 176; and so long as the consideration does not come from the individual acquisitions of the husband his creditors have no right to complain. The statute should be regarded as enabling and permit her acquisitions under the words "or otherwise," whenever his creditors will not be injured, and they cannot be injured so long as his individual acquisitions are not withdrawn from their benefit.

The New York statute does not contain the words "or otherwise" contained in the Pennsylvania statute, but limit her acquisitions to "descent, devise, bequest, gift or grant." The courts have held that a married woman without a separate estate can purchase on credit, and the property so purchased will be her separate estate: *Darby v. Callaghan*, 16 N. Y. 21; *Knapp v. Smith*, 27 N. Y. 277. In the latter case the wife of an insolvent purchased cattle on credit from her husband's assignee and gave her individual note for the whole purchase-money. She also purchased the farm and implements, and gave her note and mortgage for the whole consideration, expecting in both cases to pay for the real and personal property so purchased from the profits of farming. Her husband was employed to manage the farm and the other property purchased. In holding that the transaction was valid, that it vested a separate estate in the wife, and that the husband's creditors could not touch the property so purchased or the profits or increase thereof, even though acquired by the husband's labor or the joint labor of both, DENIO, C. J., said: "The object of the statute was to divest the title of the husband *jure mariti* during coverture and to enable the wife to take the absolute title as if unmarried. There is some difficulty in a married woman purchasing property on credit, arising out of the principle that she cannot make a contract for payment which will be binding on her personally according to the general rules of law. But if the vendor will run the risk of being able to obtain payment of the consideration, the transfer will be valid, and no estate will pass to the husband whether the wife had antecedently any separate estate or not."

This was previously held in *Darby v. Callaghan*, *supra*.

It might be urged in this case that in view of the *dictum* (or statement) in it the decision would be different if the

72, and *Porterfield v. Butler*, 47 Id. 165.

In New Hampshire a purchase on credit was sustained in *Coffin v. Morrill*, 2 Fost. 352, and rejected in *Ames v. Foster*, 42 N. H. 381, but on the ground that the American doctrine, as adopted in this state in *Albin v. Lord*, 39 N. H. 202, repudiated such transactions.

In *Buck v. Gilson et al.*, 37 Vt. 653, the facts showed that the wife purchased on credit for her own use and gave her note and mortgage, which were also signed by her husband, to secure the purchase-money. The question involved was whether or not a person who levied on this land under a judgment against the husband could maintain ejectment, and it was decided that it *could not* be done.

It has been held that a married woman without a separate estate cannot purchase on credit in North Carolina: *Lanier v. Ross*, 1 Dev. & Bat. Eq. 40; *Atkinson v. Richardson*, 74 N. C. 458. Nor in Maine: *Dunning v. Pike*, 46 Me. 461; *Newbegin v. Langley*, 39 Id. 200. Although *Merrill v. Smith* 37 Id. 394; and *Eldridge v. Preble*, 34 Id. 148, seem to indicate that if the consideration for the purchase does not come from her husband, to the injury of his creditors, the transaction would be valid whether the wife had antecedently any separate estate or not. Nor can she purchase on credit in Alabama: *Wilkinson v. Cheatham*, 45 Ala. 339; *Bibb v. Pope*, 43 Id. 190; *Marsh v. Marsh*, 43 Id. 677; although it has been asserted that she can purchase a separate estate and secure the purchase-money by mortgage: *Cowles v. Pollard*, 51 Ala. 445; *Pollard v. Cleaveland*, 43 Id. 108; *Scott v. Griggs*, 49 Id. 186. Nor in Kentucky: *Robinson v. Robinson*, 11 Bush 174; *Jarman v. Wilkerson*, 7 B. Mon. 293; *Bell v. Terry*, 13 Id. 384; *Sweeney v. Smith*, 15 Id. 327.

In Arkansas a purchase on credit or an executory contract is not valid: *Stidham v. Matthews*, 29 Ark. 650; *Tubbs*

v. Gatewood, 26 Id. 128; *Elliott v. Pearce*, 20 Id. 508; *Harrod v. Myers*, 21 Id. 601; *Wood v. Terry*, 30 Id. 385. Although the statute provides that a separate estate can be acquired by gift, grant, inheritance, devise, or otherwise, the above ruling is grounded on the American doctrine, as adopted in this state, namely, that all her contracts must relate to and be for the benefit of her separate estate or for her own benefit, which cannot be done without the possession of a separate estate in the first place: *Kelly*, *Contracts M. W.* 319.

The Florida court did not decide the question, although it was advanced in *Dollner, Potter & Co. v. Snow*, 16 Fla. 92.

In *Tillman v. Shackleton*, 15 Mich. 447, the court sustained a contract for the purchase of property on credit, although it does not appear from the case that it came within the terms of the statute.

It is believed that this exhausts all the decisions made upon this point, yet considerable light can be obtained by consulting the following decisions: *Schofroth v. Amba*, 46 Mo. 114; *Love v. Watkins*, 40 Cal. 547; *Vance v. Nogle*, 20 P. F. Smith 176; *McAboy v. Johns*, 20 Id. 9; *Hamilton v. Taylor*, 2 Cin. 402; *Hinckley v. Smith*, 51 N. Y. 21; *Clayton v. Frazier*, 33 Texas 91; *Kingsley v. Gilman*, 15 Minn. 59; *Batchelder v. Sargent*, 47 N. H. 262; *O'Daily v. Morris*, 31 Ind. 111; *Basford v. Pearson*, 7 Allen 524; *Gunter v. Williams*, 40 Ala. 561; *Richmond v. Tibbles*, 26 Iowa 474; *Woodward v. Seaver*, 38 N. H. 29; *Baker v. Hathaway*, 5 Allen 103; *Rumfelt v. Clemens*, 10 Wright 455; *Stevens v. Parish*, 29 Ind. 260; *Kolls v. De Leyer*, 41 Barb. 208; *Brunner v. Wheaton*, 46 Mo. 363; *Hunter v. Duvall*, 4 Bush 438.

The other rule advanced in the principal case that in Pennsylvania, in a contest between a married woman and the creditors of her husband, as to the wife's ownership of the property in dis-

pute, she must prove that she paid for it with her own separate funds and not with funds coming from her husband, for the reason that, in the absence of this proof, the presumption is that the means of payment came from the husband, does not accord with, and, in fact, is rejected by the decisions in New Jersey, New York, Mississippi and Alabama, on the ground that possession by the wife, as in the case of possession by other persons, is *prima facie* evidence of title, and must stand until the creditors show that she has no title; the *onus probandi* being on the creditors: *Stall v. Fulton*, 1 Vroom 430; *Kluender v. Lynch*, 4 Keys 361; *Gage v. Dauchy*, 34 N. Y. 203; *Bodgett v. Ebbiog*, 24 Miss. 245; *Saunders v. Garrett*, 33 Ala. 454. And in Georgia, *Huff v. Wright*, 39 Ga. 41; and in Wisconsin, *Weymouth v. R. R.*, 17 Wis. 550; *Morrison v. Koch*, 32 Id. 254; and in Florida, *Alston v. Rowles*, 13 Fla. 117; and in Illinois, *Manny v. Rixford*, 44 Ill. 129; *Farrell v. Putterson*, 43 Id. 52.

Such a contract resolves itself into a question of fraud, and in all such cases the *onus* is on the party urging the fraud,

and as the law enables her to be the possessor of property, there seems to be no reason why her possession is not *prima facie* evidence of title, hence it appears that on this point the Pennsylvania cases do not accord with principle or the weight of authority.

Notwithstanding this rule in Pennsylvania, that court has held that the wife need not show her title so clear that no doubt exists against it: *Tripner v. Abrahams*, 11 Wr. 220; *Flick v. Devries*, 14 Id. 266; except, perhaps, where she is seeking a specific performance: *Freeman v. Stokes*, 34 Leg. Int. 248. However, in a contest between her husband's creditors and purchasers from her, or alienees of such purchasers for a valuable consideration, the burden is on the creditors to show knowledge or notice of the husband's ownership and creditors' claim on the part of the purchasers, or circumstances which ought to have put such purchasers on their inquiry: *Keichline v. Keichline*, 4 P. F. S. 75; *Keil v. Wolf*, 7 Barr 424; *Hoar v. Arc*, 10 Harris 381.

JNO. F. KELLY.

Bellaire, Ohio.

Supreme Court of Kansas.

NORRIS v. CORKILL.

Where by statute the common-law rule as to married women has been changed so that she alone has the use and disposition of her earnings and property, her husband is not responsible for her torts not committed in his presence or by his direction.

ERROR from Sedgwick County.

This was an action in the District Court of Sedgwick County brought by Lavina Norris against Marsha Corkill and T. D. Corkill, who are husband and wife, for damages for the speaking of certain slanderous words by Marsha Corkill, wife of T. D. Corkill, of the plaintiff, Lavina Norris. The defendant, T. D. Corkill, demurred to the petition as not stating facts sufficient to constitute a cause of action against him. At the February Term

of court for 1884, the cause came on to be heard upon the demurrer of T. D. Corkill to the petition. The court sustained the demurrer and dismissed the case as to T. D. Corkill, to which ruling the defendant excepted and appealed.

G. W. C. Jones and O. H. Bentley, for plaintiff in error.

Stanley & Wall, for defendant in error.

The opinion of the court was delivered by

HORTON, C. J.—The question presented in this case is, whether the husband is liable for the slanderous words spoken by his wife when he is not present and in which he in no manner participates.

The rule of the common law makes the husband liable for the torts of his wife committed during coverture. The reason assigned for this liability is that the husband is entitled to the rents and profits of the wife's real estate during coverture and the absolute dominion over her personal property in possession. Another ground of this liability at common law, sometimes given, is that the wife, by her marriage, is entirely deprived of the use and disposal of her property, and can acquire none by her industry; that her person, labor and earnings belong unqualifiedly to the husband: Reeves's Domestic Relations, 3; Tyler on Infancy and Coverture, sec. 233.

Again, the husband also by common law might give the wife moderate correction, for, as he was to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer: 1 Blackstone's Com. (Wendell's ed.) 444-445.

Under the provisions of our statute, the reasons assigned for the liability of the husband for the torts of his wife no longer hold good, and therefore, in our opinion, under the changes made by the statute, the liability no longer exists. It is a part of the common law that where the reason of the rule fails, the rule fails with it.

"At common law the husband had control almost absolute over the person of the wife; he was entitled, as the result of their marriage, to her services, and consequently to her earnings; to her goods and chattels; had the right to reduce her choses in action to possession during her life; could collect and enjoy the rents and profits of her real estate, and thus had dominion over her property and became the arbiter of her future. She was in a condition of

complete dependence; could not contract in her own name; was bound to obey him, and her legal existence was merged in that of her husband, so that they were termed and regarded as one person in law:" *Martin v. Robson*, 65 Ill. 129; Tyler on Infancy and Coverture, ch. 19, sect. 216-233.

Under the statute, "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person, except her husband, shall remain her sole and separate property notwithstanding her marriage and not be subject to the disposal of her husband or liable for his debts." Com. Laws of 1879, ch. 62, sect. 1.

Again, "A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Sect. 2, said chap. 62.

Further, "Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property and may be used and invested by her in her own name." Sect. 4, said chap. 62.

In addition, sect. 3 of said chapter provides that a woman may, while married, sue and be sued in the same manner as if she were unmarried. Therefore, it is not true, under the existing statute, that the wife, by her marriage, is deprived of the use and disposal of her property; nor is she prohibited from acquiring property by her industry. It is not true, under the statute, that the personal property of the wife passes to the husband; nor is he entitled to the rents and profits of her real estate during coverture; nor has he any dominion over her personal property, her labor or her earnings. If she so desires, they are unqualifiedly her own and he cannot interfere with them.

Again, in this state, the common-law power of correction of the wife by the husband is no longer tolerated.

Under the common law the married woman's legal existence was almost entirely ignored. She was sunk into almost absolute non-

entity and rested in almost total disability; but all of this has been changed by the statute, and to-day, in our state, "her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself:" *Martin v. Robson, supra*. We think the provisions of our statute change the common-law rule, and thereby discharge the husband from liability for the torts of the wife committed when he is not present and with which he has no connection. The wife stands upon an equality, in this state, in all respects, with the husband. She is alone responsible for her contracts, and should be alone responsible for her words as well as her acts.

We have examined the various authorities conflicting with these views, but, owing to the provisions of our statute, we are not inclined to follow them, and, therefore, think it unnecessary to refer to them.

The judgment of the District Court will be affirmed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF GEORGIA.²

SUPREME COURT OF ILLINOIS.³

SUPREME JUDICIAL COURT OF MAINE.⁴

SUPREME JUDICIAL COURT OF WISCONSIN.⁵

ACTION. See *Officer*.

Homicide committed in another State—Administrator.—The homicide of a person in another state on a line of railroad purchased, owned and worked by a railroad company in this state, is actionable in this state, if the action be brought by a person entitled to recover: *Central R. R. v. Swint*, 71 or 72 Ga.

For a homicide done by a railroad company of this state upon a line owned and controlled by it in Alabama, the administrator of the deceased in Alabama for the use of the widow and children, could bring suit in this state by complying with the statutory requirements thereof, and thus having his appointment *quoad hoc* ratified in Georgia; but not otherwise. And if an administrator of the decedent be appointed in Georgia, he may bring the suit for the like uses: *Id*.

¹ Prepared expressly for the American Law Register, from the original opinion filed during Oct. Term 1884. The cases will probably appear in 112 U. S. Rep.

² From J. H. Lumpkin, Esq., Reporter. The cases will probably appear in 71 or 72 Ga. Rep.

³ From Hon. N. L. Freeman, Reporter; to appear in 110 Ill. Rep.

⁴ From J. W. Spaulding, Esq., Reporter; to appear in 76 Me. Rep.

⁵ From Frederic K. Conover, Esq., Reporter; to appear in 61 Wis. Rep.

Suit for Overcharge by Carrier—Trustee.—One with whom a contract for the carriage of goods is made, and who is described therein as the consignor, consignee and sole owner, may maintain an action to recover an overcharge exacted by the carrier as a condition of the delivery of the goods, although he was not in fact the owner and did not personally furnish and pay the overcharge: *Waterman v. C., M. & St. P. Ry. Co.*, 61 Wis.

ADMIRALTY. See *Constitutional Law*.

AGENT. See *Bank*.

ASSIGNMENT.

Future Wages.—Future wages to be earned under a present contract imparting to them a potential existence, may be assigned although the contract may be indefinite as to time and amount, unless affected by the statute requiring registration: *Wade v. Bessey*, 76 Me.

To an Agent or Trustee—Change of Possession.—Where a party made a writing purporting to convey all his real and personal estate to a trustee for the purpose of sales and collections for the benefit of the maker, the trustee to be paid a commission on all moneys by him received and paid over as directed, and afterwards executed and delivered to another person an assignment of a bond and mortgage securing the same, and delivered the bond and mortgage to the assignee, and there was no proof that the trustee ever had possession of the same, it was held that the assignment and delivery passed the beneficial title to the assignee: *Wellington v. Heermans*, 110 Ill.

ATTORNEY. See *Partnership*.

BANK.

Liabilities for Negligence of its Correspondents in regard to Collections.—A bank in Pittsburgh sent to a bank in New York, for collection, eleven unaccepted drafts, dated at various times through a period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J.," and were sent to the New York bank as drafts on the tea tray company. The New York bank sent them for collection to a bank in Newark, and, in its letters of transmission, recognised them as drafts on the company. The Newark bank took acceptances from Conger, individually, on his refusal to accept as secretary, but no notice of that fact was given to the Pittsburgh bank until after the first one of the drafts had matured. At that time the drawers and an endorser had become insolvent, the drawers having been in good credit when the Pittsburgh bank discounted the drafts. Held, that the New York bank was liable to the Pittsburgh bank for such damages as it had sustained by the negligence of the Newark bank: *Exchange Nat. Bank v. Third Nat. Bank*, S. C. U. S., Oct. Term 1884.

BILLS AND NOTES.

Assignment after Maturity—Mortgage.—Where the holder and owner of two notes endorsed in blank, the one over-due and the other not, placed them in the hands of an agent to receive payment of them only,

and the latter sold and delivered them to an innocent purchaser having no notice, in fact, of the agent's want of authority to negotiate the same, it was *held*, that the purchaser, as to the note past due, was put on inquiry to ascertain whether the agent had authority to negotiate the same, and took no title as to said note, but as to the note not due the purchaser acquired the legal title: *Turner v. McClelland*, 110 Ill.

While a purchaser in good faith of a note before its maturity, which is endorsed in blank, acquires the legal title, and may enforce his rights in a court of law, yet if the note is secured by mortgage on real estate, and he resorts to a court of equity to foreclose the mortgage, that court will let in any defence which would have been good against the mortgage in the hands of the mortgagee: *Id.*

A mortgage, not being assignable at law, the assignee takes it subject to equities between the parties; and the fact that he takes the note secured by the mortgage by assignment before maturity, free from all defences at law, does not protect the mortgage against equitable defences: *Id.*

COMMON CARRIER.

Special Contract limiting Liability to a Certain Amount—Valid even in case of Loss through Negligence of Company's Servants.—Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations: *Hart v. Pennsylvania Railroad Co.*, S. C. U. S., Oct. Term 1884.

H. shipped five horses, and other property, by a railroad, in one car, under a bill of lading, signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable: *First*, to pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each. * * * If a chartered car, on the stock and contents in same, twelve hundred dollars for the car-load. But no carrier shall be liable for the acts of the animals themselves, * * * nor for loss or damage arising from condition of the animals themselves, which risks, being beyond the control of the company, are hereby assumed by the owner, and the carrier released therefrom." By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were race-horses, and the plaintiff offered to show damages, based on their value, amounting to over \$25,000. The testimony was excluded, and he had a verdict for \$1200. On a writ of error, brought by him, *held*, (1) the evidence was not admissible, and the valuation and limitation of liability in the bill of lading was just and reasonable, and binding on the plaintiff; (2) the terms of the limitation covered a loss through negligence: *Id.*

Railroads—Stop-over Tickets—Negligence of Conductor—Damages.

—A passenger who, through the negligence of one conductor, is not furnished with a stop-over ticket to which he is entitled, and who, on attempting to resume his journey after a stop, is required by a second conductor to pay additional fare or leave the train, may elect to leave the train, and in that case may recover from the railroad company not merely the amount of the additional fare which he is subsequently obliged to pay in order to reach his destination, but all damages sustained by him as the direct and natural consequence of the fault of the first conductor: *Yorton v. M. L. S. & W. R. W. Co.*, 61 Wis.

Connecting Lines—Coupon Ticket—Loss of Baggage.—Where a passenger purchased a through ticket over a line of railroads, having a coupon attached for each road, and checked his baggage through to his destination, if, upon his arrival, it was found to be lost, he could hold the last road of the line responsible therefor: *Savannah T. & W. R. W. v. McIntosh*, 71 or 72 Ga.

CONSTITUTIONAL LAW.

Attachment for Maritime Tort—Jurisdiction of State Court.—While state courts can exercise no jurisdiction in cases peculiarly cognisable in admiralty, yet the statute of the United States which confers upon the district courts authority to hear and determine "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and of all seizures on land and on water not within the admiralty and maritime jurisdiction; and such jurisdiction is declared to be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit court," does not preclude a suitor from proceeding by attachment in a state court for an injury done to a dredge, because the remedy by attachment did not exist at common law, but has been conferred by statute. The intention of the statute was to confer exclusive admiralty and maritime jurisdiction upon the district courts, at the same time leaving to the suitor his option of seeking redress at the common law, when it could be so obtained: *Walter v. Kirstead*, 71 or 72 Ga.

CONTRACT. See *Guaranty*.

CORPORATION.

Misrepresentation of Capital—Action against Stockholders—Receiver.

—A creditor who has been defrauded by misrepresentations of the real capital of a bank has his remedy in an action of tort against all who participated in the fraud, but the wrong done him cannot entitle the entire body of creditors who have not suffered from the alleged fraud to recover of the entire body of stockholders who have taken no part in it. Each case stands, in this respect, upon its own particular circumstances; and it is essential to an action on account of the wilful misrepresentation of a fact made to induce a party to act, that he should have acted on it to his injury: *Fouche v. Brower*, 71 or 72 Ga.

Even where the suit is prosecuted for creditors by a receiver, acting under the appointment of the court, it is essential that the pleadings should set forth the facts entitling each of the creditors to maintain his action: *Id*

CRIMINAL LAW.

Extradition—Illegal Capture in Foreign Country—Jurisdiction over Fugitive when brought back.—The rule at common law is, that the court trying a party for crime committed within its jurisdiction, will not investigate the manner of his capture in a foreign state or country, though his capture and return may have been plainly without authority of law: *Ker v. The People*, 110 Ill.

A fugitive from justice has no asylum in a foreign country when he is guilty of an offence for which he is liable or subject to extradition, by treaty between this and the foreign government. If he is illegally and forcibly removed from such foreign country, that country alone has cause of complaint, and he cannot complain of it: *Id.*

Where no treaty exists between two governments for the extradition of criminals fleeing from justice, there is no obligation existing that can be insisted upon to surrender them for trial to the government from which they have fled; but as a matter of comity between friendly nations, great offenders are usually surrendered on request of the government claiming the right to punish them: *Id.*

Where a fugitive from justice has been brought back to the country from which he has fled, on a warrant of extradition in conformity with the terms of a treaty existing between two governments, he cannot be proceeded against or tried for any other offences than those mentioned in the treaty, and for which he was extradited, without first being afforded an opportunity of returning. But this doctrine has no application where the fugitive has been brought back forcibly, and not under the terms of the treaty, or under an extradition warrant: *Id.*

Witness—Co-defendant—Separate Trial.—In the separate trial of one or two persons jointly indicted for murder, the other defendant, even while the indictment is still pending against himself on a plea of not guilty, may with his own consent, be called as a witness and allowed to testify against his co-defendant: *State v. Burrows*, 76 Me.

Reasonable Doubt.—The term, reasonable doubt, implies that there may be doubts which are not reasonable or rational. It is not a vague or whimsical or merely possible doubt, but an actual, substantial and well-founded doubt: *State v. Rounds*, 76 Me.

It is not legally erroneous to say to a jury that the proof of guilt must be to a moral certainty. Still the phrase may mislead, because moral certainty in the popular sense may be taken to be more than moral certainty in the legal sense: *Id.*

A ruling that the law only requires that degree of certainty in the minds of jurors before rendering a verdict of guilty, as would exist in their minds in coming to a conclusion on matters of grave interest and importance to themselves, is not to be commended for judicial use. It is aided in the present case by additional definition of reasonable doubt: *Id.*

DAMAGES. See *Insurance*; *Negligence*.

Assault and Battery—Punitive Damages—Evidence of Wealth of Defendant.—In an action for assault and battery where punitive damages are recoverable, the financial condition of the defendant may be shown by evidence of his reputed wealth: *Draper v. Baker*, 61 Wis.

A verdict of \$1200 damages for an assault and battery upon the

plaintiff by spitting in her face, is held not so large as to induce this court to believe that the jury were actuated by passion, prejudice, or other improper motive: *Id.*

DOMICILE. See *Parent and Child.*

EQUITY. See *Bills and Notes.*

Cross-Bill—Effect of Demurrer to Original Bill.—Where a defendant in a bill of equity demurred thereto and also filed a cross-bill, if his demurrer was sustained and the bill dismissed, it carried the cross-bill with it; and it was error in the court to dismiss the bill but retain the cross-bill for trial: *Johnamsen v. Tauer*, 71 or 72 Ga.

EVIDENCE. See *Damages; Trial.*

Pedigree—Declarations.—On the question of pedigree, declarations are admissible, (1) When it appears by evidence *dehors* that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern. (2) That the declarant was dead when the declarations were tendered, and (3) That they were made *ante litem motam*: *Northrop v. Hale*, 76 Me.

Thus, in determining who are the rightful distributees of an intestate estate, the declarations of the intestate's sister (since deceased) in whose family the claimant was not only born and brought up, but in which the intestate herself also lived, when the claimant was born, and for several years thereafter, are admissible, when made *ante litem motam*, for the purpose of showing that the claimant was the natural son of the intestate, who had not then been married: *Id.*

EXECUTION. See *Judicial Sale.*

FRAUDS, STATUTE OF.

Memorandum in Writing—What Sufficient.—The Statute of Frauds does not require that all the terms of the contract shall be agreed to or written down at one and the same time, nor on one piece of paper; but where the memorandum of the bargain is found on separate pieces of paper, and where these papers contain the whole bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the signed paper makes such reference to the other written paper or papers as to enable the court to construe the whole of them together as containing all the terms of the bargain. If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned by reason of the absence of any internal evidence in the signed papers to show a reference to, or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute: *North v. Mendel*, 71 or 72 Ga.

Contracts not to be Performed in a Year—Pleading.—When the Statute of Frauds is relied upon in defence to an action for breach of contract, on the ground that it was not to be performed within a year, it should be pleaded specially: *Farwell v. Tillson*, 76 Me.

To defeat the application of the Statute of Frauds by the happening of a contingency, it must be such a contingency as renders performance of the contract possible within the year: *Id.*

Effect is to be given to an oral contract if proved, unless upon the whole case it appears affirmatively that it is not to be fully performed within a year : *Id.*

The Statute of Frauds does not apply to contracts which simply may not be performed within the year, even if they probably will not or are not expected to be so performed, but it does apply to those which are not to be performed within that time ; it includes any agreement, which by a reasonable construction of its terms, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within that period : *Id.*

In determining the question of the time of the performance of a contract, it is proper to consider the circumstances and situation of the parties, so far as known to each other, and the subject-matter of the contract : *Id.*

GUARANTY.

Continuing Contract.—K. wrote to H. the following letter :—" Gentlemen,—The bearer of this letter, my son-in-law, * * * wishes to place a stock of groceries in his provision and meat store, in this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you." *Held*, that the letter did not create a continuing liability ; that when the stock of groceries had been selected, and, with the aid of K., had been paid for, the latter's liability ended : *Knowlton v. Hersey*, 76 Me.

Release—Failure of Principal to realize on Collaterals.—In a suit upon the guaranty of the payment of a note owned by a bank, the fact that the bank held, before the suit, an assignment, through a trustee, of a patent right, and some claims for damages for an alleged infringement of the patent, and was offered more for such patent and claims than enough to have paid the note, such assignment having been made by the principal debtor, and the patent and claims afterwards prove valueless from an adverse ruling of the courts, will not operate to discharge the guarantor, although he may have urged the bank to accept the offer for the patent. It was the duty of the bank, as a trustee, to obtain the largest sum that could be realized, and the making of a mistake, while acting in good faith, will not subject the bank to a loss : *Kaufman v. Loomis*, 110 Ill.

GUARDIAN AND WARD.

Guardian appointed in a different State from that of the Domicile of the Ward.—When the domicile of the ward has always been in a state whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, he will not, in the absence of an express statutory requirement, be charged with the amount of the moneys invested merely because he has not complied with the more rigid rules of the courts of the state of his appointment : *Lemar v. Micon*, S. C. U. S., Oct. Term, 1884.

INSURANCE.

Who entitled to Payment—Legal Representatives—Change of Beneficiary—Insurable Interest.—An insurance policy taken by the assured

provided for the payment of a certain sum within thirty days after due notice and satisfactory evidence of his death, to his wife, or the legal representatives of the assured: *Held*, that the intention of the assured was, that his wife should have the proceeds in case she survived him, but in case she did not, such proceeds were to go to his executor or administrator, to be distributed in the due course of administration: *Johnson v. Van Epps*, 110 Ill.

The words "legal representative," in a policy of insurance, as designating the beneficiaries, when there is nothing in the context or surrounding circumstances to indicate a contrary intention, mean "executors or administrators." A policy of insurance payable to the legal representatives of the assured, is the same as if made payable to himself: *Id.*

Where a policy of insurance is made payable to the wife of the party procuring the same, or his legal representatives, whatever may be the right of the assured during the lifetime of his wife, after her death he will have the same power over it as if it had been originally payable to himself, his executors and administrators, and with the consent of the insurer he may surrender the same, and take out a new one payable to another person: *Id.*

The insurance of one's own life by a party, for the benefit of one not a relative, is not void on grounds of public policy, as tending to encourage the commission of crime. But if it were, no one but the insurer can raise the question. That cannot be urged by the heirs of the person insured: *Id.*

Non-Payment of Premium—Waiver of Forfeiture—Damages.—Although notices issued by a life insurance company required the premiums to be paid at 12 o'clock M., on the day they fell due, yet where there was no such stipulation in the policy itself, and according to the course of all previous dealings between it and the assured, a literal compliance with this requirement had not been exacted, if the right to do so existed at all, it was waived, and the company could not exist on a strict and literal compliance without notifying the assured, before the day of payment, of an intention to do so: *Alabama Gold Life Ins. Co. v. Garmany*, 71 or 72 Ga.

Where a policy of life insurance provided for the payment of premiums annually, and gave the assured the right to continue the insurance, if, after the policy had been continued for several years, the company improperly refused to receive further premiums or to continue the insurance, on a suit brought therefor by the assured, the measure of his damages was the amount of premiums paid, with interest on each from the time such payment was made: *Id.*

JUDICIAL SALE.

Execution pending Appeal—Sale Irregular not Void.—The issuing of an execution on a judgment of the circuit court pending an appeal from the same, is irregular, but the execution is not void; and a sale of land under such execution is subject to be set aside on motion by the defendant, made in proper time, but by no one else; and if not so set aside, the sale will pass the defendant's title to the land: *Shirk et al. v. Metropolis and New Columbia Gravel Road Co.*, 110 Ill.

No one but the defendant in an execution can question a sale of his land under the same for an irregularity. If he fails to have the same set aside, and acquiesces in the sale, no one acquiring a title from or through him can question the validity of the sale, especially in a collateral proceeding: *Id.*

LIMITATIONS, STATUTE OF.

Malicious Prosecution—Termination of Prosecution.—In cases of malicious prosecution on the criminal side of the court, the right of action does not accrue until the prosecution terminates; and so, by analogy, the rule should be the same in malicious prosecutions on the civil side of the court, in respect to the time when the right of action accrues and the statute begins to run, except in cases of seizure of personalty under execution, where the litigation is protracted by a claim interposed by the person whose property is seized. In that case the right of action would accrue whenever the personalty was seized, and the statute would then begin to run, and four years after that time would bar the action: *Printup v. Smith*, 71 or 72 Ga.

MALICIOUS PROSECUTION. See *Limitation, Statute of*.

False Arrest—Warrant Issued by Inferior Court.—An action for false arrest does not lie against an officer for serving a precept issued by an inferior magistrate, if the magistrate has jurisdiction of the offence alleged, and the precept upon its face discloses that he has jurisdiction of the person of the offender: *Elsemore v. Longfellow*, 76 Me.

The process discloses jurisdiction of the person against whom it runs, if a proper cause is indicated, though it may be ever so irregularly and imperfectly expressed. Amendable irregularities do not vitiate. To render the officer liable the precept must be absolutely void: *Id.*

MASTER AND SERVANT.

Injury to Servant—Negligence of Fellow-Servant—Master and Mate of Vessel.—The owners of a vessel are not liable for an injury to the mate resulting from the negligence of the master, the latter being a fellow-servant of the mate engaged in a common employment: *Thompson v. Herman*, 47 Wis., distinguished: *Mathews v. Case*, 61 Wis.

Negligence—Who is Fellow-servant.—A crew of men were engaged under a foreman or superintendent in repairing a dam for a log-driving company, incorporated by the laws of the state, when one of the laborers was injured by the carelessness of another who acted under the direction and immediate observation of the foreman in doing the particular act complained of: *Hell*, That the foreman and laborers were fellow-servants within the rule exculpating the company from liability: *Doughty v. Penobscot Log Driving Co.*, 76 Me.

Negligence—Fellow-servant.—One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, is to be regarded as a contractor with and not a servant of the company. He is not a fellow-servant with the superintendent of the company under whose direction his work is performed: *Mayhew v. Sullivan Mining Co.*, 76 Me.

MECHANICS' LIEN. See *United States Courts*.

MORTGAGE. See *Bills and Notes*; *Notice*.

NEGLIGENCE. See *Action*; *Master and Servant*; *Telegraph*; *Trial*.

Railroad Crossings—Accidents—Contributory Negligence—Damages—Jury.—It is settled in this state that in actions against railroad companies for injuries to persons, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed, did not by his want of ordinary care contribute to produce the accident: *State v. Maine Central R. Co.*, 76 Me.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established: *Id.*

In a prosecution, by indictment, against a railroad company for negligently causing the death of a person at a crossing, the amount of the forfeiture between the minimum and maximum sums fixed by the statute, should be assessed by the jury: *Id.*

Railroad—Failure to Stop and Listen at Crossing—Evidence—Proof of Usage of Company at other Crossings.—A person approaching a railway crossing with a team and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction, especially when it would be impossible to see or hear an approaching train because of an embankment or other obstruction to sight and sound: *Bowen v. C., M. & St. P. R. Co.*, 61 Wis.

An instruction that it was the duty of a person approaching a railway crossing to have looked up the track if by so doing he could have ascertained the approach of a train at a *sufficient distance* to have avoided it, is *held* proper. The question what was such sufficient distance was for the jury: *Id.*

The question being whether the bell was rung and the whistle blown as a locomotive approached a highway crossing, evidence that those things were not done at a similar crossing three miles distant was admissible: *Id.*

NOTICE.

Mortgage—Record—Unrecorded Deed.—When the record of a mortgage is defective it is not notice of such mortgage. Thus, a mortgage for the security of two thousand dollars was recorded as one for two hundred dollars. *Held*, that the record was no notice of the two thousand dollar mortgage: *Hill v. McNichol*, 76 Me.

When a purchaser of real estate, without notice of a prior unrecorded deed, for a valuable consideration conveys to one who had notice thereof, the title of the latter is not impaired by the notice: *Id.*

OFFICER.

Assumpsit—School Agent—Compensation for Official Duties.—A school agent's mere election and performance of official duties, raise no implied promise on the part of the town to pay him for such services: *Talbot v. Inhabitants of East Machias*, 76 Me.

In the absence of any implied contract or statutory provision entitling him to pay for official duties rendered, a school agent can maintain no action therefor against his town: *Id.*

PARENT AND CHILD.

Domicile of Child of a Widow who Re-marries.—Although a widow by marrying again, acquires the domicile of her second husband, she does not, by taking the children of her first husband to live with her there, make the domicile which she derives from her second husband their domicile; but they retain the domicile which they had, before her second marriage, acquired from her or from their father: *Lamar v. Micon*, S. C. U. S., Oct. Term 1884.

PARTNERSHIP.

Liability for Acts of Partner after Dissolution—Attorneys.—Where a note and mortgage have been intrusted to a firm of attorneys for collection, the mere dissolution of the firm will not release one partner from responsibility to the client for money subsequently collected by the other partner to whom that business was, by the terms of the dissolution, transferred. Such release could be brought about only by the express contract of the parties or by a contract fairly implied from the circumstances and transaction after the dissolution. Instructions in such a case giving too much importance to the mere fact of dissolution are held to have been misleading: *Waldech v. Brand*, 61 Wis.

PATENT.

Re-issue for the Purpose of Enlarging the Claim—Time of Application for.—A patent cannot be lawfully re-issued for the mere purpose of enlarging the claim, unless there has been a clear mistake inadvertently committed in the wording of the claim, and the application for re-issue is made within a reasonably short time. Whether there has been such an inadvertent mistake is, in general, a matter of fact for the commissioner to decide; but whether the application is made in reasonable time is matter of law, which the court may determine by comparing the re-issued patent with the original, and, if necessary, with the records in the patent-office, when presented by the record: *Maher v. Harwood*, S. C. U. S., Oct. Term 1884.

The principles announced in the case of *Miller v. Bruss & Co.*, 104 U. S. 350, in reference to re-issuing patents for the purpose of enlarging the claims, reiterated and explained: *Id.*

No invariable rule can be laid down as to what is a reasonable time within which the patentee must seek for the correction of a claim which he considers too narrow. It is for the court to judge in each case, and it will exercise proper liberality towards the patentee. But as the law charges him with notice of what his patent contains, he will be held to reasonable diligence. By analogy to the rule as to effect of public use before an application for a patent, a delay of more than two years would in general, require special circumstances for its excuse: *Id.*

As, in the present case, there was a delay of nearly four years, and the original patent was plain, simple, and free from obscurity, it was held that the delay in seeking a correction by re-issue was unreasonable, and that the commissioner had, therefore, no authority to grant it; and the

patent was held invalid so far as the claims were broader than those in the original patent : *Id.*

RAILROAD. See *Common Carrier ; Negligence.*

RECEIVER. See *Corporation.*

SET-OFF.

Physician's Account—Negligence.—Where suit was brought on a physician's account for services and medicine, it might be pleaded that he did not do his work skilfully, or a plea of recoupment might be filed, springing out of the contract ; but a plea of set-off, based on a tort in giving defendant too large a dose of medicine, which injured him to the amount of two hundred dollars, was not proper as matter of defence ; nor does it matter whether the defendant was insolvent or not : *McLeroy v. Sewell*, 71 or 72 Ga.

SURETY. See *Guaranty.*

TELEGRAPH.

Negligence—Cipher Dispatch—Delay in Delivery—Damages—Evidence.—Where a telegraphic message was sent by cable, and suit was brought for damages resulting from a failure to deliver it, after its receipt at its point of destination, within a reasonable time, the copy message written by the telegraph operator at the point of destination and eventually delivered was admissible in evidence, without producing the original message written out at the point of transmission, there being no claim that the message delivered differed from that sent : *West. Un. Tel. Co. v. Fatman*, 71 or 72 Ga.

Where a ship broker, whose office was near that of a telegraph company, had sent other messages by cable through such company, and a cipher message from a company in Liverpool was sent to him, there was enough to put the telegraph company on notice that it was a matter of important commercial business, and required reasonable and ordinary dispatch in delivery ; and the party injured by a failure to use such dispatch would not be limited to recovering nominal damages : *Id.*

Telegraph companies and common carriers are not identical as regards notice, or notice of value of the dispatch : *Id.*

If a telegraph company receives a cipher dispatch, and undertakes to carry it and deliver it to the person to whom directed, in consideration of money paid to them, it is their duty to make such delivery within a reasonable time : *Id.*

If a message sent by cable was received at the office of the telegraph company at the point of destination at 10.24 A. M., and was not delivered until 11.55 A. M., the office of the person to whom it was directed being within five minutes' walk from that of the company, and, in the meantime, loss occurred by reason of this failure to deliver, there was enough to warrant the jury in finding that the delay was unreasonable : *Id.*

Where, by reason of the failure on the part of a telegraph company to deliver a message directed to a ship broker, he lost a contract by which he would have made certain commissions, had the message been promptly delivered, a recovery of the amount of such commissions was not too remote or speculative a measure of damages : *Id.*

TRIAL.

Injuries to Person—Examination by Physician at Trial.—In an action for personal injuries the court may, in a proper case, at the trial direct the plaintiff to submit to a personal examination by physicians on behalf of the defendant: *White v. Milwaukee City R. R. Co.*, 61 Wis.

TRUST AND TRUSTEE. See *Action*.

Execution of Power of Appointment—Necessity of Deed by Trustee.—S., the wife of B., joined with him in a deed to H. of land of B., in trust, for the use of S. during her life, and at any time, to convey it to such person as S. might request or direct in writing, with the written consent of B. Afterwards B. made a deed of the land to W., in which H. did not join, and in which B. was the only grantor, and S. was not described as a party, but which was signed by S. and bore her seal, and was acknowledged by her in the proper manner. *Held*, that the latter deed did not convey the legal title to the land, and was not made in execution of the power reserved to S.: *Batchelor v. Brereton*, S. C. U. S., Oct. T. 1884.

UNITED STATES.

Effect of Seizure of Buildings by United States Marshal upon Right to proceed under Mechanics' Lien in State Court.—A building was commenced June 25th 1872, from which time the mechanics' liens dated, although the first of them was filed and action to enforce it commenced February 21st 1873. On January 24th 1873, the buildings were seized for a forfeiture under the internal revenue laws of the United States; process of attachment was issued to the marshal February 5th 1873, and after condemnation and forfeiture he sold the premises in May 1883. The sheriff of the county also sold the premises in September 1873, under judgments on the mechanics' liens obtained in June 1873. *Held*, that the sheriff's sale was nugatory and void, because based upon proceedings instituted while the *res* was in the exclusive custody and control of the United States Court: *Heidritter v. Elizabeth Oil-Cloth Co.*, S. C. U. S., Oct. Term, 1884.

Semble, that the mechanics' lien creditors might, without prejudice to the jurisdiction of the United States Court, have commenced their actions, so far as that was a step required by the state law, for the mere purpose of fixing and preserving their rights to a lien; provided, always, they did not prosecute their actions to a sale and disposition of the property, which, by relation, would have the effect of avoiding the jurisdiction of the United States Court under its seizure: *Id.*

UNITED STATES COURTS.

Jurisdiction—Suit by a National Bank in the Name of its President.—*Practice.*—The bill in this case was filed by H. B. "in his capacity of president of the New Orleans National Bank," against a citizen of Louisiana, and the defendant, on appeal, assigned as error, the want of the proper citizenship to give the United States Circuit Court jurisdiction. Upon an inspection of the whole record it appeared that the suit was treated by both parties and by the circuit court as the suit of the bank and not of Baldwin. *Held*, that the defendant will not be allowed on final hearing, in order to defeat the jurisdiction, to assert, for the first time, that Baldwin, and not the bank, was the complainant: *Fortier v. New Orleans Nat. Bank*, S. C. U. S., Oct. Term, 1884.

WAGES. See *Assignment*.

WATERS AND WATERCOURSES.

Mill-owners—Mill-dams—Right of Passage—Waters—Reasonable Use.—A mill-owner upon a floatable river is not under legal obligation to provide a public way, for the passage of logs over his dam, better than would be afforded by the natural condition of the river unobstructed by his mills. The right of passage is the natural flow of the river or its equivalent: *Pearson v. Rolfe*, 76 Me.

A mill-owner is not under legal obligation to furnish any public passage for logs over his dam or through his mills at a time when the river at such place, in its natural condition, does not contain water enough to be floatable if unobstructed by mills, although the river is generally of a floatable character: *Id.*

Whenever a river, with mills upon it, is floatable, and the mill-owner and those who want to float logs past the mills are desirous of using the water at the same time, all parties are entitled to reasonable use of the common boom; the right of passage is the superior, but not an usurping, excessive or exclusive, right: the law authorizing mills put some incumbrance upon the right of passage: *Id.*

What is a reasonable use is a question of fact, and depends upon the size and nature of the stream, the extent and kinds of business upon it, and all other circumstances: *Id.*

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CONSTITUTIONAL REGULATIONS OF LEGISLATIVE PROCEEDINGS.

RULES prescribing forms for the guidance of legislatures are incorporated in many of the state constitutions now in force. These vary in their scope, in some cases extending to a considerable number of requirements, and in others being few in number. They are also expressed in varying terms. Their purpose is the prevention of some of the evils which grew out of legislation when little or no restriction was placed upon the mode of procedure, "as if with the advance toward 'a higher civilization' greater precautions were requisite in legislative matters than in the early days of our state's history."

The English Doctrine.—There are no restrictions upon the Parliament of Great Britain as to the mode of its procedure, and there is no such thing known to English law as the unconstitutional enactment of a statute. There can be no inquiry as to the regularity of an enactment; the enrolled act is a verity: *Rez v. Arundel*, Hob. 110; *Prince's Case*, 8 Coke 145. There is no common law in this country in conflict with this: *People v. Devlin*, 33 N. Y. 281; *State v. Swift*, 10 Nev. 176; *Pangborn v. Young*, 32 N. J. L. 29; *Sherman v. Story*, 30 Cal. 253; *Falconer v. Higgins*, 2 McLean 195; *Pacific Railroad Co. v. Governor*, 23 Mo. 362; *Fouke v. Fleming*, 13 Md. 412; *Brodnax v. Groom*, 64 N. C. 244; *People v. Starne*, 35 Ill. 121.

In many cases constitutional regulations of the forms of procedure
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are said to be mandatory on legislative bodies; but after action the presumption is that they have been observed, and the courts will not go back of the enrolled act to impeach it. See *Usener v. State*, 8 Tex. App. 177; *Central Railway Co. v. Hearne*, 32 Tex. 546; *Blessing v. Galveston*, 42 Id. 641; *Kilgore v. Magee*, 85 Penn. St. 401; *People v. Burke*, 34 Cal. 661; *Eld v. Gorham*, 20 Conn. 8; *People v. Commissioners*, 54 N. Y. 276; *Evans v. Browne*, 30 Ind. 514; *Bender v. State*, 53 Id. 254; *Commissioners v. Burford*, 93 Id. 383; *Edger v. Board*, 70 Id. 331; *Lottery Co. v. Richoux*, 23 La. Ann. 743; *Green v. Weller*, 32 Miss. 650; *Swann v. Buck*, 40 Id. 268; *Mayor v. Harwood*, 32 Md. 471; *Thompson's Case*, 9 Op. Attys.-Gen. 1; *Miller v. State*, 5 Ohio St. 275; *Purdy v. People*, 4 Hill 390; *De Bow v. People*, 1 Den. 14; *State v. Glenn*, 1 West Coast Rep. 50, and cases cited *ante*.

Conflict of Authority.—The rule which seems to be established by these cases has not been uniformly held by several of the courts which decided them. In some states, especially California and Missouri, changes in the fundamental law have necessitated the establishment of a rule different from that announced in the cases cited. But before the constitutions now in force in these states were adopted there was a conflict of authority. In *Fowler v. Peirce*, 2 Cal. 165, the court say, by MURRAY, C. J.: "I am of opinion that there is no difference between declaring a law unconstitutional for matters patent upon its face, though passed regularly, and a law apparently good, yet passed in violation of those rules which the constitution has imposed for the protection of the rights and liberties of the citizen." The court held an act which purported to have been approved on a day on which it might legally have been done, void, because as a matter of fact it was approved when the power to do the act did not exist. In *State v. McBride*, 4 Mo. 303, the question was whether an amendment to the constitution had been voted for by the required number of members of the legislature, and it appears to have been determined by the record contained in the legislative journals. This case was doubtless overruled by *Pacific Railroad Co. v. Governor*, *ante*, which has been overruled by *Bradley v. West*, 60 Mo. 33, and *State v. Mead*, 71 Id. 266. Both these last cases were decided under the present constitution, which differs materially from that in force when the earlier cases were ruled. *Sherman v. Story* has also

been overruled by *Weill v. Kenfield*, 54 Cal. 111, under a like change in the fundamental law. The earlier cases in Indiana held to the American doctrine. See *Skinner v. Deming*, 2 Ind. 558; *Coleman v. Dobbins*, 8 Id. 156. And intimations and dicta in its favor are to be found in some of the New York cases, which have been frequently cited in its support. See *People v. Purdy*, 2 Hill 31; s. c. in error, 4 Id. 384; *De Bow v. People*, 1 Den. 9; *Com. Bank v. Sparrow*, 2 Id. 97. The rule in Maryland has been changed by *Berry v. Baltimore, etc., Railroad Co.*, 41 Md. 446, and *Legg v. Mayor, etc.*, 42 Id. 203. The cases cited from Mississippi must be considered overruled by *Brady v. West*, 50 Miss. 68, where the court say: "It is clearly competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether." Two Iowa cases (*Clare v. State*, 5 Iowa 509; *Duncombe v. Prindle*, 12 Id. 1) are often cited in support of the doctrine that the enrolled act is conclusive; but they only determine that where there is a conflict between the printed and the enrolled act, the latter is the ultimate proof of the expression of the legislative will. Whether the journals were competent, evidence, or their effect, was not considered in either case: *Koehler v. Hill*, 60 Iowa 543.

The American Doctrine.—The power and duty of courts to look behind the enrolled act and determine that it has received the required number of votes, or that in its enactment there has been a substantial compliance with the forms prescribed by the constitution is upheld by a large number of cases: *Skinner v. Denning*, 2 Ind. 528; *Post v. Supervisors*, 105 U. S. 667; *Smithee v. Garth*, 33 Ark. 17; *Hull v. Miller*, 4 Neb. 503; *Walker v. Griffith*, 60 Ala. 361; *Williams v. State*, 6 Lea (Tenn.) 549; *Supervisors v. Heenan*, 2 Minn. 330; *Coleman v. Dobbins*, 8 Ind. 156; *In re Roberts*, 5 Colo. 525; *In re Welman*, 20 Vt. 656; *Legg v. Mayor, &c.*, 42 Md. 203; *Osburn v. Staley*, 5 W. Va. 85; *State v. Platt*, 2 S. C. 150; *Walker v. State*, 12 Ind. 200; *State v. Hagood*, 13 Id. 46; *Worthen v. Badgett*, 32 Ark. 496; *State v. Mead*, 71 Mo. 266; *Smithee v. Campbell*, 41 Ark. 471; *South Ottawa v. Perkins*, 94 U. S. 260; *Spangler v. Jacoby*, 14 Ill. 297; *Prescott v. Trustees*, 19 Id. 324; *People v. Starne*, 35 Id. 121; *Ryan v. Lynch*, 68 Id. 160; *Turley v. County of Logan*, 17 Id. 151; *Burr v. Ross*, 19 Ark. 250; *Weill v. Kenfield*, 54

Cal. 111; *Fordyce v. Godman*, 20 Ohio St. 1; *Berry v. Baltimore, &c., Railroad Co.*, 41 Md. 446; *Bradley v. West*, 60 Mo. 33; *Green v. Graves*, 1 Doug. (Mich.) 351; *People v. Mahaney*, 13 Mich. 481; *State v. Francis*, 26 Kans. 724; *State ex rel. v. Hastings*, 24 Minn. 78; *Brown v. Nash*, 1 Wyoming 85; *State v. Little Rock, &c., Railway Co.*, 31 Ark. 701; *Vinsant v. Knox*, 27 Id. 266; *Moody v. State*, 48 Ala. 115; *Gaines v. Horrigan*, 4 Lea (Tenn.) 608; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Jones v. Hutchinson*, 43 Ala. 721; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *Gardner v. Collector*, 6 Wall. 489; *State v. Gould*, 31 Minn. 189. See *Koehler v. Hill*, 60 Iowa 543; *Bound v. Railroad Co.*, 45 Wis. 543.

To hold that the legislative journals are not appropriate evidence on the question whether a bill had been passed by the constitutional number of votes would in effect be to hold that a bill *may* become a law without receiving the number of votes required by the constitution; that a single presiding officer may, by his signature, give the force of law to a bill which the journal of the body over which he presides, and which is kept under the supervision of the whole body, shows not to have been voted for by the constitutional number of members: *Fordyce v. Godman*, 20 Ohio St. 1. The Supreme Court of the United States say: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule:" *Gardner v. Collector*, 6 Wall. 499. The validity of a statute is a question of law, and the court will not act upon the admission of parties that it has not been passed in a constitutional manner: *Happel v. Brethauer*, 70 Ill. 166. See *Ottawa v. Perkins*, 94 U. S. 268; *Post v. Supervisors*, 105 Id. 667; *Railroad Tax Cases*, 13 Fed. Rep. 767.

Notice of Application for Enactment of Law.—The constitution of Alabama provides that "no local or special law shall be passed on any subject which cannot be provided for by a general law, unless notice of the intention to apply therefor shall have been pub-

lished," &c. In *Harrison v. Gordy*, 57 Ala. 49, the legislative journal showed that the notice given was of intention to apply for an act prohibiting the sale of liquors within four miles of the courthouse at St. Stephens. The bill corresponded with the notice, but was amended to embrace an area of eight miles. In reply to the contention that the notice did not warrant the act, the court said that it was perfectly consistent with all that appeared in the journals that the notice embraced the larger area. It will not be presumed from the silence of the journals that the prescribed notice was not given, and that the required proof of it was not made: *Walker v. Griffith*, 60 Ala. 361. In North Carolina, under a similar provision, the signatures of the presiding officers make the law a matter of record, and it cannot be impeached collaterally. In Arkansas a law having for its object the settlement of a debt due from the citizens of the state to it, and its debt due to them, is not within the scope of the constitutional requirement, not being, it seems, local or special: *State v. Crawford*, 35 Ark. 237. In Florida the prohibition of the constitution concerning the amendment of acts of incorporation, unless notice had been given, could not control the legislature in the matter of legislation concerning roads belonging to the system of internal improvements which the constitution made it the duty of the legislature to create and encourage: *Palmer v. Louisville, &c., Railroad Co.*, 19 Fla. 231.

The constitution of Rhode Island requires that when a bill shall be presented for the creation of certain corporations it shall be continued until another election of members of the general assembly shall have taken place, and that such public notice of the pendency thereof shall be given as may be required by law. The Supreme Court of Maine has held these provisions to be directory merely, and not to affect corporations unless in case of intervention by the state. After charter is granted, the presumption is that all preliminary requirements have been complied with: *McClinch v. Sturgis*, 72 Me. 288. A statute requiring that notice of private petitions pending before the legislature should be given in a prescribed manner, held to be merely directory. The legislature might act upon a notice which did not comply with the statute, or without notice: *Day v. Stetson*, 8 Me. 365.

The Enacting Style.—An enacting style is prescribed by nearly all the State constitutions. In his work on the Law and Practice of Legislative Assemblies, p. 820, Cushing says: "Where enacting

words are prescribed, nothing can be a law which is not introduced by these very words, even though others which are equivalent, are at the same time used." The authorities do not sustain this statement, and are not harmonious. The direction is not mandatory, and the omission of the words "by the general assembly of Maryland" from the enacting clause, does not render the act void: *McPherson v. Leonard*, 25 Md. 377. An act without an enacting clause is void: *Seat of Government Cases*, 1 Wash. Ter. 135. When a bill adopting a body of laws, divided into separate chapters, is preceded by the required words, it is sufficient: *Dew v. Cunningham*, 28 Ala. 466. But when sections and chapters of a code or revision are passed at different times, such of them as do not contain an enacting clause are void: *Vinsant v. Knox*, 27 Ark. 266. Literal compliance with the words used in the constitution is not essential. "Resolved," held equivalent to "be it enacted," in a joint resolution which had the force of law: *Swann v. Buck*, 40 Miss. 268. The style prescribed for laws is inapplicable to a "resolution, order or vote," as contradistinguished from a "bill," by the constitution: *State v. Delesdenier*, 7 Tex. 76. Whether it is mandatory or directory only as to laws is discussed but not decided in *Navigation Co. v. Galveston*, 45 Tex. 287. A statute is not void because when introduced the bill had no enacting clause: *Powell v. Jackson Com. Council*, 51 Mich. 129. Where the enacting clause is stricken out of a bill, and the house which struck it out subsequently passed the bill, the journal not showing a reconsideration of the first vote, the passage of the bill held to be tantamount to a rescission thereof: *Wenner v. Thornton*, 98 Ill. 156.

In West Virginia the force and effect of law cannot be given to a joint resolution: *Boyers v. Crane*, 1 West Va. 176.

A statute providing that the form of an ordinance by the county board of supervisors should be: "The county board of supervisors of the county of——do order and determine as follows," is mandatory, and was not complied with by proceedings disclosed by the record to be as follows: "On motion of——the board of supervisors do order and determine:" *Smith v. Sherry*, 54 Wis. 114. In *Austrian v. Guy*, 21 Fed. Rep. 500, the same statute was considered, and was held to be complied with by an order as follows: "It is understood, ordered and determined."

Several readings.—Provisions requiring that all bills of a gen-

eral character, or all bills appropriating money, or certain other classes of bills shall be read at length one or more times on one or more days, are embodied in a number of constitutions. In some states the requirement is held to be mandatory, and that failure to comply will invalidate the law: *People v. Campbell*, 8 Ill. 466, limited by *Supervisors v. People*, 25 Id. 181; *People v. Starne*, 35 Id. 121; *Supervisors v. Heenan*, 2 Minn. 330; *State v. Hagood*, 13 S. C. 46. In others it is merely directory: *Usener v. State*, 8 Tex. App. 177; *Blessing v. Galveston*, 42 Tex. 641. Its observance is secured by the sense of duty and the official oaths of members of the legislature, and not by any supervisory power of the courts: *Kilgore v. Magee*, 85 Penn. St. 401; *Miller v. State*, 5 Ohio St. 275.

Where the journals show that a bill was passed, and contain nothing to show that it was not read as the constitution requires, the presumption is that it was so read, and this presumption is not liable to be rebutted: *Miller v. State*, ante; *Supervisors v. People*, 25 Ill. 181; qualifying *Campbell v. People*, 8 Id. 466; *Walker v. Griffith*, 60 Ala. 361; *State ex rel. v. Hastings*, 24 Minn. 43; *Vinsant v. Knox*, 27 Ark. 279; *English v. Oliver*, 28 Id. 317; *Worthen v. Badgett*, 32 Id. 516; *Usener v. State*, 8 Tex. App. 177; *Blessing v. Galveston*, 42 Tex. 641. If the journals are kept loosely the law will be sustained if compliance with the constitution can be spelled out: *Supervisors v. Heenan*, 2 Minn. 330. If a third reading is shown two previous readings will be implied and the act upheld: *English v. Oliver*, ante.

The constitution now in force in California provides: "Nor shall any bill become a law unless the same shall be read on three several days in each house, * * * and on the final passage of all bills they shall be read at length." In *Weill v. Kenfield*, 54 Cal. 111, this is construed as requiring every bill to be read at length on three separate days in each house, and that the silence of the journals as to the suspension of the rule does not support the presumption that the bill was read. See *Railroad Tax Cases*, 13 Fed. Rep. 722, 766. The first clause quoted above is in the constitution of South Carolina, and the doctrine of *State v. Hagood*, ante, is to the effect that the readings must be shown from the journals, or the original bill, or both. Under a similar provision in the constitution of Texas, the contrary rule is established: *Usener v. State*, 8 Tex. App. 177; *Blessing v. Galveston*, 42 Tex. 641.

If a bill, after being twice read in the house to which it is sent for concurrence, is recalled by the house in which it originated, one additional reading after its return to the house from which it was recalled, is a substantial compliance: *State v. Crawford*, 35 Ark. 237. A bill may be read the first time in the house to which it is sent for concurrence on the same day of its passage by the other house: *Chicot Co. v. Davies*, 40 Ark. 200; *State v. Crawford*, *ante*.

A slight change in the title of a bill will not invalidate the readings it had before the change was made: *Larrison v. Peoria, etc., Railroad Co.*, 77 Ill. 11; *Walnut v. Wade*, 103 U. S. 683; *Plummer v. People*, 74 Ill. 361. If the identity of the bill can be ascertained from the journals, and the change is not one of substance and apt or calculated to mislead, the validity of the act will not be affected: *Supervisors v. Heenan*, 2 Minn. 330.

Where it is required that the bill shall be read at length it is not necessary that everything which is to become law by its enactment should be read. In *Bibb County Loan Association v. Richards*, 21 Ga. 592, it is ruled that a statute incorporating a loan association and making all its transactions by and with its members, whilst acting under and by virtue of certain authority, valid and binding in law, was valid, notwithstanding the transactions to which reference was made were not incorporated in the statute and were not read. In *Dew v. Cunningham*, 28 Ala. 466, it is remarked that to construe this provision to include everything which is to become law by the enactment of a bill, would exclude the power to make comprehensive enactments.

Are amendments required to be read?—In *Miller v. State*, 5 Ohio St. 275, the bill originally introduced, after being read twice, and on different days, was referred to a select committee, who reported it back with one amendment, to wit, “strike out all after the enacting clause and insert a new bill;” this bill was subsequently amended and then agreed to, read the third time and passed. It was argued that this “new bill” should have been read three times. In reply, the court say: “But, for argument’s sake, let it be admitted that the bill as amended was read but once in the senate; is the act, for that reason, void? That, counting the two readings before the amendment, and the final reading, the bill was read three times, is conceded, for these readings are shown by the journal, and it is also conceded that, in general, three readings of an amendment are not necessary. But inasmuch as the amend-

ment in this case is styled in the journal "a new bill" it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. * * * When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days; but when there is no such vital alteration, three readings of the amendment are not required." In *Ferguson v. Miners' Bank*, 3 Sneed (Tenn.) 609, there is no direct adjudication, but it is said that adopting amendments of a character entirely distinct from that of the bill, on its third and last reading, has the appearance, at least of an evasion of the constitution. If the new matter is not germane to that of the original bill, it would seem to be a new bill, although it may be called an amendment, and if so, should be read three times instead of once in each house. In *English v. Oliver*, 28 Ark. 317, the rule in *Miller v. State*, ante, was followed. The court say: "The proceedings appear to have been irregular, or that a complete journal was not made of all that was done. It is not affirmatively shown how this substitute bill came before the house, nor is it affirmatively shown that it was read a first and second time, but the journal shows that it was read a third time. To have a third reading would imply a first and second, and there is nothing before us to show that such readings were not had." Amendments are not embraced within the meaning of the constitution of Illinois: *People ex rel. v. Wallace*, 70 Ill. 680; nor in South Carolina, it seems: *State v. Platt*, 2 S. C. 150, 156.

Suspension of Rule requiring Several Readings.—In cases of "urgency" or "emergency" the rule concerning readings may be suspended by a majority or two-thirds vote. Whether any given state of circumstances present a "case of urgency" authorizing a suspension of this rule is solely for the legislature to determine; and the reasons for its action need not be given in the journals: *Hull v. Miller*, 4 Neb. 503. Where the journals recite that by a yea and nay vote the readings were dispensed with, the presumption is that the vote was a two-thirds vote, and that there was a case of emergency: *McCulloch v. State*, 11 Ind. 424. When the required number of readings are shown on the same day a strong and *prima facie* implication arises that the suspension of the rule was deemed expedient: *Turley v. County of Logan*, 17 Ill. 151. Where it is

not required that the journals affirmatively show that the rules were suspended, and the bill was read by title, the presumption is that they were suspended: *Chicot County v. Davies*, 40 Ark. 200; *Vinsant v. Knox*, 27 Id. 278; *English v. Oliver*, 28 Id. 320.

Setting out Revised, Altered or Amended Acts at Length.—In some constitutions provisions are to be found of the same import as the following from the constitution of Michigan: "No law shall be revised, altered or amended by reference to its title only, but the act revised or section or sections of the act altered or amended shall be re-enacted, and published at length." In *People v. Mahaney*, 13 Mich. 481, it is said: "This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not re-published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation."

This provision is not merely a rule of procedure for the legislature, but renders null and void any law which does not conform to it. It is binding upon all branches of the government. *Tuska-loosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Smails v. White*, 4 Neb. 353; *Sovereign v. State*, 7 Id. 409; *Walker v. Caldwell*, 4 La. Ann. 297; *McGhee v. State*, 2 Lea (Tenn.) 622.

It makes no difference whether the intention to amend appears from the title or body of the act; if it has that effect it is within this provision: *Smails v. White*, *ante*. In Indiana an act is not within the constitution unless it professes to amend some act or section of an existing law: *Blakemore v. Dolan*, 50 Ind. 194. This is the general rule. See *People v. Mahaney*, 13 Mich. 481; *Lake v. Palmer*, 18 Fla. 501; Cooley's Cons. Lim. *152, note 3. Statutes which amend or repeal by implication are not embraced: *State v. Draper*, 47 Mo. 29; *Geisen v. Heiderich*, 104 Ill. 537; *Fleischner v. Chadwick*, 5 Ore. 152; *State v. Cain*, 8 W. Va.

720; *State v. Geiger*, 65 Mo. 306; *Lehman v. McBride*, 15 Ohio St. 573. In *People v. Whipple*, 47 Cal. 592, it is determined that it is competent for the legislature, in creating an office, to define the duties of the incumbent by making reference to another and existing statute, and to provide that those duties shall be the same as required by the act so referred to. In consequence, of the rule that repeals by implication are not favored, the repugnance between the earlier and former statutes must be irreconcilable, or this rule will not be applied: *State v. Draper, ante*.

A complete law which of itself covers the entire subject with which it deals is not in this provision: *Jones v. Davis*, 6 Neb. 33; *People v. Wright*, 70 Ill. 388; *Commonwealth v. Drewry*, 15 Gratt. 1; *Ex parte Pollard*, 40 Ala. 77; *Davis v. State*, 7 Md. 151; *Parkinson v. State*, 14 Id. 184. An act is independent when it embraces matter not previously legislated upon, or it may be independent when there is a law upon the subject, and the act does not attempt to amend such law, but makes a new enactment: *Blakemore v. Dolan*, 50 Ind. 194. A law is revised or amended when it is in whole or part permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose: *Falconer v. Robinson*, 46 Ala. 340.

If a section or part of a law is obnoxious to this provision, the validity of the other parts or sections is not thereby affected, if capable of separation: *Ex parte Pollard*, 40 Ala. 77.

The later cases generally hold that the requirement of the constitution is complied with by setting out at length the act or section revised or amended as it is with the amendment or revision embodied in it: *People v. Pritchard*, 21 Mich. 236; *Portland v. Stock*, 2 Ore. 69; *Lehman v. McBride*, 15 Ohio St. 573; *Van Riper v. Parsons*, 40 N. J. L. 123; *Colwell v. Chamberlain*, 43 Id. 387; *People v. McCallum*, 1 Neb. 182. In Louisiana and Indiana it was formerly held that it was necessary to set out the law in full as it stood before amendment or revision: *Langdon v. Applegate*, 5 Ind. 327; *Wilkins v. Miller*, 9 Id. 102; *Rogers v. State*, 6 Id. 31; *Kennon v. Shull*, 9 Id. 154; *Armstrong v. Berreman*, 13 Id. 422. These cases were overruled in *Greencastle, etc., Co. v. State*, 28 Id. 382, which has been adhered to ever since. The Louisiana cases (*Walker v. Caldwell*, 4 La. Ann. 297; *Heirs of*

Duverge v. Salter, 5 Id. 94), which were the basis of the rule originally established in Indiana, appear to be overruled in *Arnoult v. New Orleans*, 11 La. Ann. 54.

Under the peculiar phraseology of the constitution of Missouri, where an entire act is revised or re-enacted, it must be set forth and published in whole; where the whole act is amended the same course must be pursued, but where only a part of an act is amended the amendatory part only need be set out and published: *Mayor v. Trigg*, 46 Mo. 288.

The constitution of Tennessee requires that "All acts which revive, repeal or amend former laws shall recite, in their caption or otherwise, the title or substance of the law repealed, revived or amended." This applies to repeals by implication: *McGhee v. State*, 2 Lea 622. It does not require a recital of the substance of an act any further than it is amended or repealed. If the substance of that part of the act which is to be amended or repealed is recited, it is sufficient: *State v. Gaines*, 1 Id. 734.

The constitution of New York provides that "no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." In *People ex rel. v. Banks*, 67 N. Y. 568, it is remarked that "It is not necessary, in order to avoid a conflict with this article of the constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute, but the enforcement of the right or duty, and the final imposition of the burden are directed to be in the form, and by the procedure given by the other and general laws of the state." In *Wells v. Buffalo*, 14 Hun 438, it is decided that this provision does not contemplate that in an act amending a prior one, the whole of the latter should be copied into it. It "should only be applied when in a subsequent statute another act is referred to, not to amend it, but to give effect to the provisions of the new. In other words, the new act must, by its express terms, provide that an existing law shall be made or deemed a part of it. This is not done when the new act merely amends the former."

Miscellaneous Provisions.—The constitution of Michigan provides

that "no new bill shall be introduced into either house of the legislature after the first fifty days of a session shall have expired." In *Pack v. Barton*, 47 Mich. 520, within the prescribed time a bill was offered for the organization of the township of Montmorency, and after the expiration of that time it was so changed as to provide for the organization of a county with that name. The purpose of each proposition was practically the same—to give the inhabitants of the territory a distinct municipal government. There was nothing to give rise to any inference that in the change made there was a purpose to evade the constitutional command. It was held that the act was not invalid. To the same effect is *Powell v. Jackson Common Council*, 51 Mich. 129.

It is provided by the constitution of Arkansas that "no bill shall be so altered or amended on its passage, through either house, as to change its original purpose." An amendment which limits or extends the scope of the bill, but embraces no new matter not germane to its original purpose, is not within this provision: *Loftin v. Watson*, 32 Ark. 414.

The Required Vote.—Some courts distinguish between the constitutional requirements concerning the mode of enacting laws and the authority by which they are enacted, and will take notice of the journals where the validity of the law is challenged on the ground that it did not receive the assent of the legislature, but will not do so where a disregard of the prescribed forms of legislation is relied upon to overturn it: *Miller v. State*, 5 Ohio St. 275; *Fordyce v. Godman*, 20 Id. 1; *Kilgore v. Magee*, 85 Penn. St. 401, are instanced. In the last case the court observe: "The evidence of a law—its actual existence—we may inquire into; for before we are bound by it we must be satisfied it is the act of the legislature, however informally they may have conducted the process by which they have made it a law. See *Southwark Bank v. Commonwealth*, 26 Penn. St. 446.

Where the vote on the passage of bills is not required to be taken by yeas and nays and entered on the journal, the presumption arising from the signatures of the presiding officers to the enrolled act will overcome their silence: *Williams v. State*, 6 Lea (Tenn.) 549; *In re Roberts*, 5 Colo. 525; *State v. Mead*, 71 Mo. 266; *Worthen v. Badgett*, 32 Ark. 496. But where the aye and nay vote is required to be entered on the journal, it must affirmatively appear that the bill received a constitutional majority: *Post v. Supervisors*, 105

U. S. 677 ; *Hull v. Miller*, 4 Neb. 305 ; *Supervisors v. Heenan*, 2 Minn. 330 ; *Green v. Graves*, 1 Doug. (Mich.) 351 ; *Spangler v. Jacoby*, 14 Ill. 297 ; *People v. Starne*, 35 Id. 121 ; *Ryan v. Lynch*, 68 Id. 160 ; *Fordyce v. Godman*, 20 Ohio St. 1 ; *People v. De Wolf*, 62 Ill. 253 ; *Opinion of Justices*, 35 N.H. 579 ; *Railroad Tax Cases*, 13 Fed. Rep. 722 ; *County of Santa Clara v. Southern Pacific Railway Co.*, 18 Id. 385 ; *State v. Francis*, 26 Kans. 724 ; *Bond Debt Cases*, 12 S. C. 200. Where the journal shows that a bill did not receive the required two-thirds vote on its third reading in the house, but that it did upon its final passage by that body after it was returned from the other body with slight amendments, it shows a substantial compliance : *Bond Debt Cases*, ante. Names of members who vote in the negative must appear as well as of those who vote in the affirmative : *Smithee v. Garth*, 33 Ark. 17. A bill which the journal shows to have been indefinitely postponed, and which it does not show was ever taken up again, is not a law : *Burr v. Ross*, 19 Ark. 250.

In *Steckert v. East Saginaw*, 22 Mich. 104, the charter required that the vote of the city council in certain cases should be entered on the minutes. It was held not to be complied with by a record which showed that a vote was adopted unanimously on call, the names not appearing.

The provision of the constitution of New York requiring the question upon the final passage of a bill to be taken immediately upon its last reading and the yeas and nays to be entered on the journal, is only directory to the legislature. There is no clause declaring the act to be void if this direction be not followed : *People v. Supervisors*, 8 N. Y. 317.

Amendments may be concurred in without entry of yeas and nays in journal : *Com. v. Higginbotham*, 17 Kans. 62 ; *Haynes v. Heller*, 12 Id. 383 ; *Hull v. Miller*, 4 Neb. 503.

The constitution of West Virginia provides that no bill shall be passed by either branch without an affirmative vote of the majority of the members elected thereto. The senate was comprised of twenty-two members, one of whom had resigned his seat after its organization. An act which received eleven votes after such resignation was held valid : *Osburn v. Staley*, 5 W. Va. 85. "Two-thirds of the members of each branch of the general assembly," means two-thirds of the members present, a quorum voting : *Morton v. Comptroller-Gen.*, 4 S. C. 430 ; *Bond Debt Cases*, 12 Id. 200.

"Two-thirds vote," as these words are used in the constitution of Minnesota, means a vote in each house of two-thirds of all the members thereof: *State v. Gould*, 31 Minn. 189.

In *People v. Mahaney*, 13 Mich. 481, the court was asked to declare an act unconstitutional because a portion of those who voted for it were not legally elected. It was held that this could not be done; that while the court was bound to take notice of legislative action concerning the validity of statutes, it could not do so in regard to the facts attending the election of members, even though the facts are to be found in the journals; that an act cannot be declared void because a portion of those who voted for it, and whose votes were essential to its passage, were not legally elected and were retained in their seats by a decision opposed to the constitution.

The house of representatives of Kansas consisted of four more persons than the maximum number provided for by the constitution. An act was passed by the aid of the votes of three of the four persons who were not entitled to seats, but who were admitted by the action of the house. It was held void: *State v. Francis*, 26 Kans. 724.

Signatures of Presiding Officers.—In states where the enrolled bill is conclusive as to the regularity of the proceedings, and the signatures of the presiding officers thereto are required by the constitution, the only evidence that the bill has passed is furnished thereby. Their signatures are absolutely essential to the existence of the law: *State v. Glenn*, 1 West Coast Rep. 50; *Pacific Railroad Co. v. Governor*, 23 Mo. 353; *Evans v. Browne*, 30 Ind. 523; *Broadnax v. Groom*, 64 N. C. 244; and are evidence of its passage over the executive veto: *Pacific Railroad Co. v. Governor*, *ante*. It is intimated in *Gaines v. Horrigan*, 4 Lea (Tenn.) 608, that the requirements of the new constitution that all bills shall be signed in open session and that the fact of signing shall be entered on the journal, is intended to furnish conclusive evidence that they were passed.

The constitution of Missouri provides that "no bill shall become a law until the same shall have been signed by the presiding officer of each house in open session." This requirement is mandatory: *State v. Mead*, 71 Mo. 266. Other provisions, such as requiring him, before affixing his signature, to suspend all other business, declare that such bill will now be read, and that the fact of signing

shall be noted on the journal, are merely directory: *Ibid.* The same rule, as to the fact of signing being noted on the journals, is held in Colorado: *In re Roberts*, 5 Colo. 525. In Nebraska it is provided that "the presiding officer of each house shall sign publicly, in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions." In *Cottrell v. State*, 9 Neb. 125, it is said that the signatures are merely a certificate to the governor that the bill has passed the requisite number of readings and been adopted by the constitutional majority. Where the journals show that the bill has received the required vote, and it has been approved, failure of the presiding officer of either house to attach his signature will not invalidate it. This is the rule in Kansas: *Commissioners v. Higginbotham*, 17 Kans. 62. At common law signatures are not necessary: *Speer v. Plank-Road Co.*, 22 Penn. St. 376.

The constitution of Nevada requires the signatures of the presiding officers, and also of the secretary of the senate and clerk of the assembly. The signature of the assistant secretary of the senate is held to satisfy the requirements of the secretary's signature. *State v. Glenn*, 1 West Coast Rep. 50. No little stress is laid on the established legislative custom and the dire consequences which would result from establishing the contrary doctrine.

Under a statute directing the presiding officers, when a bill requires three-fifths of all the members elected to be present at its final passage, to certify such fact, and making the certificate presumptive evidence of the fact, it was ruled that it was not competent for the legislature to make the failure of its officers to append the proper certificate, defeat the provisions of the constitution. *People v. Supervisors*, 8 N. Y. 317. The certificate might be impeached if it certified that the requisite number was present when the fact was otherwise; and if the certificate was not given, the fact that three-fifths were present might be shown from the journals or other proper evidence. *Ibid.* In *People v. Commissioners*, 54 N. Y. 276, it is ruled that laws which come under the constitutional provision requiring two-thirds of the members elected to vote therefor, are not valid if it does not appear from the statute book or the enrolled act that they received the required number of votes. In such cases, where the bill is only certified in the form of an ordinary majority bill, it is at least *prima facie* evidence that it did not receive a two-thirds vote. *People v. Purdy*, 2 Hill 34.

Value of Journals as Evidence.—The conflict of opinion between the two lines of authority concerning the effect to be given to legislative journals is well illustrated by the language of Judge BLACK in 9 Op. Attys.-Gen. 1, and the rule of the New Hampshire court in the opinion of the justices, 52 N. H. 622. In *Thompson's Case*, Judge BLACK says that, to make all legislation ultimately depend on the fidelity with which a journal-clerk has made his entries, is to render the law as uncertain as the terms of a horse-trade. The New Hampshire court say that the journals are to be considered and treated as authentic records of the proceedings of the legislature, and that the *prima facie* evidence arising from the enrolled act is overcome by their showing that the act did not pass. See 35 N. H. 579. The only provision in the constitution of New Hampshire concerning journals is that the journal of the proceedings shall be printed and published immediately after adjournment of the legislature. The rule in New Hampshire is substantially the same as that in Illinois: *Spangler v. Jacoby*, 14 Ill. 297; *Prescott v. Trustees*, 19 Id. 324; *People v. Starnes*, 35 Id. 121; *Ryan v. Lynch*, 68 Id. 160; *Miller v. Goodwin*, 70 Id. 659. To the same effect is *Weild v. Kenfield*, 54 Cal. 111; *Fordyce v. Godman*, 20 Ohio St. 1; *Brady v. West*, 50 Miss. 78.

The silence of the journals is conclusive only in those matters where the constitution requires them to show the action taken: *Chicot County v. Davies*, 40 Ark. 206. If the facts which the constitution requires the journal to set forth do not appear the conclusion is that they did not transpire: *Spangler v. Jacoby*, *ante*. Silence concerning compliance with constitutional requirements supports the presumption of correct action: *In re Roberts*, 5 Colo. 525; *State v. Mead*, 71 Mo. 266; *Miller v. State*, 5 Ohio St. 275; *Worthen v. Badgett*, 33 Ark. 496. See *Walker v. Griffith*, 60 Ala. 361; *Harrison v. Gordy*, 57 Id. 49.

The recital of the journal are verities. The house keeping it is the only tribunal by which it can be corrected: *McCulloch v. State*, 11 Ind. 424. Obvious clerical errors in the journal will be disregarded: *Bound v. Railroad Co.*, 45 Wis. 543; *Williams v. State*, 6 Lea (Tenn.) 549. Journals may be corrected at any session of the same legislature: *Turley v. County of Logan*, 17 Ill. 151. If there is a discrepancy between the printed and the manuscript journals the latter will prevail: *County of Santa Clara v. Southern Pacific Railway Co.*, 18 Fed. Rep. 285; *Chicot County*

v. *Davies*, 40 Ark. 200 The requirement to keep a journal does not make it necessary that it should be signed, or that the accuracy of the copy thereof be certified to: *Miller v. Goodman*, 70 Ill. 659. J. R. BERRYMAN.

Madison, Wis.

RECENT ENGLISH DECISIONS.

Queen's Bench Division.

HAINES v. GUTHRIE.

In an action for the price of goods sold and delivered the defendant pleaded infancy. He sought to prove the plea by a statement contained in an affidavit made in a chancery suit, to which the plaintiff was not a party, by the defendant's father, since deceased.

Held, that there being no question of pedigree in the case, the evidence was not admissible.

APPEAL of the defendant from the judgment of STEPHEN and MATHEW, JJ.

In an action for 731*l.* for goods sold and delivered, the defendant pleaded that at the time of the alleged purchase he was an infant under the age of twenty-one years, and that the things were not necessaries. The trial before GROVE, J., and a special jury resulted in a verdict for the plaintiff for 4*l.* 16*s.*, for things which were found to be necessaries. The plaintiff applied for a new trial, on the ground of the improper reception of evidence in favor of the defendant.

The evidence in question was admitted in support of the plea of infancy, and consisted of a statement as to the date of the defendant's birth, contained in an affidavit made in a chancery suit, to which the plaintiff was not a party, by the defendant's father, who had since died.

STEPHEN and MATHEW, JJ., having ordered a new trial,
The defendant appealed.

Willis, Q. C., and *L. Glyn*, for the defendant.

Lumley Smith, Q. C., and *H. D. Greene*, for the plaintiff.

BRETT, M. R.—In this case the action was for the price of certain goods sold by the plaintiff to the defendant, and the sale must have been either for an agreed price or for a reasonable price. The

defence is that at the time when the bargain was made, supposing it was for an agreed price, it was not binding, because at that time the defendant was under twenty-one years of age. We have to consider what is the rule of evidence which may be applicable to this and to many other cases. The evidence which was said to have been admissible was a declaration in an affidavit by the defendant's father, who had since died, as to the date of the defendant's birth, and, if it were admissible, it would be very strong evidence to show that when the defendant made this bargain he was under twenty-one years of age. Then arises the question whether in such a suit as this, upon such a dispute as this, with regard to such an issue as this, that evidence was admissible. It is obvious that the question of what family the defendant belonged to is wholly immaterial, as also is the question of whose son he was. The question whether he was a legitimate or natural son, or an elder or younger son, is also wholly immaterial. There is no question of family in the matter. The question is of the time when he was born, and that has nothing to do with any family question which can be suggested. Then arises this problem: Can this evidence, with regard to such a question so stated, be received in evidence against the present plaintiff? It cannot be, of course, unless there is some rule of law by which a mere declaration upon such a question so stated is evidence against all the world. It cannot be doubted that this is what is called hearsay evidence, which, as a general rule, is not admissible. Therefore the case must be brought within the recognised exceptions to that rule. It seems to me that the case cannot be argued merely upon principle. The law of evidence in England has been determined by the authority of successive decisions of the courts. It is a branch of law which depends entirely upon the authority of the courts; therefore we must look to the decisions to see whether this exception to the acknowledged rule has ever been admitted. There are many well-known exceptions which it would be difficult to make out for the first time to be rightly admitted. Nay, there are great authorities who think that the original rule is bad for the purpose of arriving at the truth. But it is no part of the province of the court to consider whether that rule is good or bad, or to enunciate a new principle with regard to those exceptions; we must see what are the recognised exceptions.

Now, we have a recent declaration of what the exceptions are by

Lord BLACKBURN, who enumerates them in *Sturla v. Freccia*, 5 Appeal Cases, at page 640. He says: "It is not disputed that the general rule of English law is that hearsay evidence is not receivable; one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not see that if we were but beginning to make the law we should be able to say exactly why so much should be admitted and no more; probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those. Now, the first and one of the most important exceptions is briefly expressed in a *dictum* in *Higham v. Ridgway*, 10 E. 109, that documents on the face of them appearing to be against the interest of a deceased person who stated the matter are evidence. I need not enter into the qualifications of that further than to point out that in no point of view can this *Giunta di Marina* who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests. Then there is a second class of cases, of which *Price v. Lord Torrington*, 1 Salk. 285, may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There, again, I do not go into the qualifications, or express any opinion upon the different matters introduced, further than to point out that in no sense can it be said that the *Giunta di Marina* was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle. Then comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible; where it is a public right, or a *quasi* public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it and had stated it. Upon that, again, I merely say that the question we are now inquiring into—viz., the history of a private individual—is not a matter in which, in any sense, reputation generally can be received. Then there is another class of cases which comes nearer to it. It has been estab-

lished for a long while that, in questions of pedigree—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but, for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree, and such statements by deceased members of the family may be proved, not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.”

I take it that Lord BLACKBURN intended to make an exhaustive enumeration of the exceptions; therefore the exception which is applicable here is, where there is a question of pedigree to prove which the evidence is given. If that is true, and it is true, as I have stated, that there is no question of family at all in this matter, how can any one say that this evidence was given in a question of pedigree to prove pedigree? The case is not brought within the exceptions; therefore it would be wrong to try and explain all the cases cited. There is not a decision, but a strong opinion of PATTERSON, J., in *Figg v. Wedderburn*, 11 L. J. Q. B. 45, that, in such a case, the question is not one of pedigree, and therefore the evidence is not admissible. So also, in *Plant v. Taylor*, 7 H. & N. 227, POLLOCK, C. B., says that, in an action for the price of goods sold and delivered, the declarations of deceased persons are not admissible to prove that the defendant is an infant, though it is different where the question is one of pedigree. For the reasons I have given, I take it this is not a question of pedigree within the meaning of that word as used by the judges when they established the exceptions. Therefore the case is not within any exception to the rule against the admissibility of hearsay evidence. On that ground I am of opinion that the evidence was not admissible, and, therefore, that the decision of the Divisional Court was right, and that the appeal must be dismissed.

BOWEN, L. J.—I am of the same opinion. I only add a word in order to emphasize the exact point which this case decides—viz.

that, in such a suit as this, upon such an issue as this, the declaration of a deceased person is not admissible to prove infancy, the question not being as to any family at all, but as to the age of the particular defendant.

FRY, L. J.—I am entirely of the same opinion. The law laid down by Ld. BLACKBURN in the House of Lords was exactly that laid down a hundred years ago in *R. v. Inhab. of Eriswell*, 3 T. R. 707, by Ld. KENYON, who said: "I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in such cases. That, however, has been always understood to be an excepted case and to stand on reasons peculiar to itself, which I need not take up time by stating." Therefore he states that the exception is confined to questions of pedigree. The question here is simply whether the defendant had attained the age of twenty-one; any question as to the father or mother of the defendant is wholly immaterial; therefore, there is no question of pedigree in this case. I am therefore of opinion that the appeal must be dismissed.

Appeal dismissed

The burden of proving the fact of infancy is on the defendant who sets it up, being one of those facts peculiarly within his knowledge: *Borthwick v. Carruthers*, 1 T. R. 648; *Stewart v. Ashley*, 34 Mich. 183; *Jeune v. Ward*, 2 Stark. 330; *Bay v. Gunn*, 1 Denio 108; *Hartley v. Wharton*, 11 Ad. & El. 934. And ordinarily it should be proved, like any other fact, by competent evidence; and proof "by inspection" has been thought not to be a part of our law: Met. on Cont., p. 44. Still, if the defendant offers himself as a witness, the jury may take into consideration his appearance, as that may furnish satisfactory evidence that he was or was not of age, at some particular time; though not establishing the exact date of his birth: *Commonwealth v. Emmons*, 98 Mass. 8. And a person himself may testify to his own age: *Hill v. Eldridge*, 126 Mass. 234; *Cheever v. Congdon*, 34 Mich. 296; *State*

v. Cain, 9 W. Virg. 568. So, of course, may his relatives who have known him personally from his infancy: *Kellogg v. Kimball*, 126 Mass. 163.

Entries of a baptism on a baptismal register, made in the course of official duty, though not direct evidence of the date of a person's birth stated therein, may still be used to prove the date of baptism, as well as the fact, and with evidence *aliunde* of the person's age at his baptism, may indirectly aid in establishing the date of his birth: *Whitaker v. McLaughlin*, 115 Mass. 168. And that such entry is proof of the date of baptism as well as the fact, see the interesting opinion of GRAY, J., in *Kennedy v. Doyle*, 10 Allen 161.

As to the precise point involved in the principal case, the American text-writers seem to confine the admissibility of such evidence to cases where the issue on trial involves some question of pedigree or re

lationship. Thus, Dr. Wharton, in 1 Wh. Ev., p. 208, says: "Pedigree, if we are to understand it as co-extensive with the facts to prove which evidence of the class before us is admissible, includes not merely the relationships of families, but the dates of the births, deaths and marriages of its members, *when the object of such evidence is to trace relationship*. For this purpose the declarations of deceased relatives are admissible."

Prof. Greenleaf uses similar language; thus: "The term pedigree, however, embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts therefore may be proved in the manner above mentioned, in all cases where they occur incidentally, and in relation to pedigree." 1 Greenl. Ev., § 104. And this rule has been frequently followed in America to prove the time of a birth or death, when that fact is incidentally involved in a ques-

tion of pedigree or relationship. See *Am. Life Ins. Co. v. Rosenagle*, 77 Penn. St. 516; *Morrill v. Foster*, 33 N. H. 386.

On the other hand such evidence, viz., declarations of deceased relatives, seems to have been sometimes admitted, where no question of pedigree or relationship was at all involved, but only the age or birth of a particular person; as when a defendant is sued on contract, and pleads his infancy in defence, he has been allowed (contrary to our principal case) to prove such fact by the declarations of parents then deceased. See *Watson v. Brewster*, 1 Penn. St. 383; *Clements v. Hunt*, 1 Jones (Law) 400. But the better opinion seems to be that as such evidence is exceptional, it should be confined to narrow limits, and admitted only as a part of the evidence of pedigree, or relationship, and when that fact is a material inquiry. EDMUND H. BENNETT.

Boston.

RECENT CANADIAN DECISIONS.

Queen's Bench of Manitoba.

McCAFFREY v. THE CANADIAN PACIFIC RAILWAY CO.

A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, &c., even when these are packed with the baggage for which they are liable.

When goods remain at the station at which a passenger alights, but it does not appear that the railway company has charged, or is entitled to charge, for storage, the company is not liable as warehousemen.

THIS was a motion to set aside a nonsuit and grant a new trial. The facts are fully cited in the opinion.

J. H. D. Munson, for plaintiff.

J. A. M. Aikins, for defendants.

The opinion of the court was delivered by

TAYLOR, J.—In the month of April 1882, plaintiff's wife purchased from the agent of the Great Western Railway Company, in

the city of Toronto, tickets for the conveyance of herself and children, from Toronto to Winnipeg, over certain lines of railway including that of the defendants. At the time of purchasing the tickets, she had her baggage checked, in the usual way, through from Toronto to Winnipeg. She reached Winnipeg on the 24th of April, and on the following day, she and the plaintiff went to the railway station to get her baggage, and there saw the trunk, the loss of which is the subject of this action. Her other trunks had not at this time arrived, and acting, as she says, on the advice of some person at the station, she did not take it away, but left it to await the arrival of the others. A day or two after, the other trunks arrived, and were taken away by the plaintiff and his wife. The trunk which had first arrived, had however, in the meantime disappeared and has never been received by the owner. For the loss of it, the present action is brought.

The declaration as originally framed had four counts. The first against the defendants as common carriers of goods for hire, alleging a contract to carry certain goods, and charging a breach of the contract. The second is in tort, charging that the goods were lost by the negligence of the defendants while in their possession, as common carriers. The third is against the defendants as warehousemen and bailees. The fourth is in trover. Before the trial, a fifth count was added under an order obtained from the Chief Justice, for the loss of the baggage of the plaintiff's wife, a passenger on the defendant's railway.

The defendants pleaded a number of pleas, those to the fourth count being, not guilty, and that the goods in question were not the goods of the plaintiff.

To the added count the defendants pleaded—first, non assumpsit; second, that the plaintiff did not cause his wife to become and be a passenger with her luggage as alleged; third, that they are not carriers of passengers and their luggage as alleged; fourth, that the luggage was not the property of the plaintiff or his wife as alleged; fifth, that they did safely and securely carry the said luggage; sixth, that so far as the added count relates to the following goods, setting them out in detail, the plaintiff's wife "as such passenger caused to be transferred to the defendants' line of railway, the articles herein before mentioned as part of her personal luggage, to be carried as such luggage, and did not give notice to the defendants that her luggage comprised such articles as the articles herein-

before mentioned, and which was transferred to them as her personal luggage, that the same were not personal luggage, but freight or extra luggage, and should have been paid for as such by the plaintiff's wife, and the defendants would not have received them as personal luggage, if they had known what the articles were, and that the same were while on the said passenger train or at the railway station lost or stolen;" and for a seventh plea, that the luggage was taken to be carried under and by virtue of a contract made with another railway company.

At the trial of the action a nonsuit was entered. The plaintiff afterwards obtained a rule calling on the defendants to show cause why the nonsuit should not be set aside and a new trial had, and the two questions now to be decided in disposing of that rule are, whether the contents of the trunk sued for were, or were not personal luggage, and whether the defendants are, or are not liable as warehousemen.

The contents of the trunk as given in evidence by the plaintiff's wife consisted principally of household furnishings, intended for the use of the family when settled in Winnipeg. Among them were window curtains, blankets, sheets, counterpanes, feather pillows, pillow-slips, cutlery, books, pictures, parlor ornaments, stereopticon and views. There were also two silk dresses, petticoats, childrens' clothing, two suits of gentlemen's clothing, and an opera glass.

In England, it seems now well settled that the personal luggage which a passenger is entitled to have carried with him, in right of his having purchased a ticket for his own conveyance, is limited to such clothing and such articles as a traveller usually carries with him, for his personal convenience. *Great Northern Railway Co. v. Shepherd*, 8 Ex. 38: or, as it is expressed in Story on Bailments, sec. 499, "such articles of necessity or personal convenience, as are usually carried by passengers for their personal use." See also *Hudston v. Midland Railway Co.*, L. R., 4 Q. B. 371.

The question was fully considered in the case of *Macrow v. Great Western Railway Co.*, L. R. 6 Q. B. 612, where the plaintiff having left Canada to settle in England, sued the defendants for a trunk containing sheets, blankets and quilts, lost while he was travelling with it between Liverpool and London, and the court held, that the article being intended for the use of the plaintiff's household when permanently settled, could not be considered as

personal or ordinary passenger's luggage, and therefore the company were not liable. Numerous other English cases to the same effect might be cited, specially *Cahill v. London & N. W. Railway Co.*, 13 C. B. N. S. 818.

The courts in Ontario have followed the English authorities on this subject. Reference may be made to *Shaw v. Grand Trunk Railway Co.*, 7 U. C. C. P. 493. *Bruty v. Grand Trunk Railway Co.*, 32 U. C. Q. B. 66 and *Lee v. Grand Trunk Railway Co.*, Id. 350.

In the United States a different rule seems at one time to have prevailed, on the ground, that the length of the journey and the requirements of travelling would make articles luggage in that country, which would not be considered such in England.

Thus in *Ouimit v. Henshaw*, 35 Vt. 605, a bed, pillows, bedding and bed-quilts, carried by a man travelling from Canada to the United States, were held to be personal baggage.

More recently, however, the American decisions are in accordance with those in England. Thus baggage was held not to include a trunk, containing valuable merchandise. *Pardee v. Drew*, 52 Wend. 459; nor samples of merchandise carried to enable the passenger to make bargains: *Hawkins v. Hoffman*, 6 Hill 586. So silverware carried in the trunk of a passenger has been held not personal luggage: *Bell v. Drew*, 4 E. D. Smith 50; and so a dozen silver teaspoons, a Colt's revolver, or surgical instruments, except the passenger be connected with the medical profession, are not: *Giles v. Fauntleroy*, 13 Md. 126. The conclusion to be drawn from the American decisions is given in a note in 2 Redfield's Am. Ry. Cases 138, in which the question of what particular articles may, or may not, be carried by a passenger as luggage, is considered, and it is there said the very word "baggage" or "luggage" as applied to the traveller, implies that it is something which he "bags up" or "lugs along" with him, for his daily comfort and convenience on his journey.

Following then what seems now to be the uniform line of decisions in England, the United States, and Ontario, there can be no doubt that the greater part of the articles contained in the trunk in question did not come within the class of personal luggage, which a passenger is entitled to have carried along with him, in virtue of his having purchased a ticket for his conveyance, and the loss of which will render the carrier liable. No attempt was made to

show on the evidence here, as was attempted in *Cahill v. London & N. W. Ry. Co.*, 10 C. B. N. S. 154; 13 Id. 818, and in *Lee v. Grand Trunk Ry. Co.*, 36 U. C. Q. B. 350, that the company's servants knew, or from the appearance of the trunk must be assumed to have known that its contents were not ordinary personal luggage.

Although the greater part of the contents of this trunk could not come within the class of personal luggage, some of them did so. The silk dresses, petticoats, and children's clothing may fairly be held to do so, and perhaps the opera glass. The two suits of gentlemen's clothing do not, under the circumstances of this case, for the trunk was being carried along with the plaintiff's wife. Women's dresses carried in a man's trunk, have been held clearly not to be personal luggage, for which the carrier would be responsible: *Miss. P. Ry. v. Kennedy*, 41 Miss. 671.

The fact that articles which may fairly be considered personal luggage are packed and carried with others of a different character, does not relieve the carrier from liability for the value of the articles, which are personal luggage. It was so held in *Bruty v. Grand Trunk Ry. Co.*, 32 U. C. Q. B. 66, and in *Great N. Ry. Co. v. Shepherd*, 8 Ex. 30.

As to the count charging the defendants with liability for this trunk, as warehousemen, we think they are not liable.

The case mainly relied upon by the plaintiff in support of their liability was *Mitchell v. Lancashire & Yorkshire Ry. Co.*, L. R., 10 Q. B. 256. The plaintiff's counsel, on the argument, referred to that case as one in which BLACKBURN, J., held that if the defendants could charge storage, then they were bailees for him and liable. He further contended that in the present case, the defendants charged storage upon the other pieces of luggage brought by the plaintiff's wife, so that they clearly came within that case. A reference to the case, however, shows that the language used by the learned judge was, "I think in this case the railway company, in holding these goods, could have charged warehouse rent, and that being so, I think there can be no doubt that *prima facie* there was a liability as bailees for reward."

In that case a quantity of flax having been consigned to the plaintiff at one of the company's stations, a notice was sent him on its arrival, requiring him to remove it, and stating that the defendants held it, not as common carriers, but as warehousemen,

and subject to the usual warehouse charges. The company clearly put themselves in the position of warehousemen, and gave the plaintiff notice that they intended charging as such for the storage of the flax. Then there was undoubted evidence of such negligence on their part as would render warehousemen liable. The contention of the company on certain words in their notice, that the goods were "at owner's sole risk," amounted, BLACKBURN, J. said, to this, "we are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all."

In fact, the sole question in that case was, whether under the notice as worded the company had any liability at all or not.

In the present case the evidence does not show that defendants charged or were entitled to charge any storage or warehouse rent for this trunk. As to the payment made on the other trunks, the only evidence is that of the plaintiff himself, and all he said was in answer to a question, "Did you have to pay anything on that baggage?" "Yes, I paid something like \$3.00 for extra baggage and storage." Now the plaintiff's wife travelled with herself and six children on two tickets and a half one, and she had with her five trunks for which quantity a charge for extra luggage might well be made. We think before the defendants can be made liable as warehousemen, there should have been clearer evidence that storage was charged by them on luggage or that they are entitled to make such a charge. Besides there is no evidence of negligence on the part of the defendants. The plaintiff's wife came about the time of the great floods, which in the spring of 1882, interrupted railway traffic, the trunk was seen on the platform at the station, with a number of other trunks, and the plaintiff did not then take it away but requested one of the defendants' servants to put it "under the platform out of the drops of wet." Then we learn from Mr. Pearse, a witness called by the plaintiff, and who is in the employment of the company, for tracing lost baggage and freight, that he saw the trunk at Brandon station, and ordered it to be returned to Winnipeg. His belief is, that the trunk was on its return to Winnipeg stolen. He says it could not be delivered to any one, except on a lost check receipt, and there is no such receipt in existence.

The value of the articles which would properly come within the designation of personal luggage is sworn by the plaintiff's wife to

be \$96.50, and the plaintiff cannot claim to put them higher than his own witness, the only one who gives the values, has done. For this amount the plaintiff should have a verdict. If the parties agree to a verdict for this amount being entered, the nonsuit granted at the trial should be set aside without costs. If they do not, as this is a jury case, and we cannot enter a verdict unless agreed to, there must be a new trial without costs.

Passenger preceding or following Baggage.—Ordinarily it makes no difference whether a passenger goes a few hours before or a few hours after his baggage. It is true that it must be carried with him upon his journey, but substantial compliance with this requirement suffices. It need not start or arrive at precisely the same instant as the passenger's departure or arrival. The following instances show this to be the rule of law and illustrate the liability of the carrier: A trunk was taken possession of by the baggage-master, who promised that it should be safely carried to the point designated by the passenger, who, however, did not travel with it. Nothing was said about his paying any compensation for carrying the trunk, which was lost in transit. *Held*, company liable: *Wilson v. Grand Trunk Rd.*, 57 Me. 138. A trunk preceded the passenger to his final destination on account of his buying and using a stop-over ticket on the way. It was rifled of its contents by burglars in defendant's waiting-room, where it had been stored. *Held*, company liable: *C., R. I. & P. Rd. v. Fahy*, 52 Ill. 106. The baggage was put aboard the car with knowledge of the agent that the passenger was not to go until the next trip. No person was employed to take care of the baggage; each passenger was expected to look out for his own. The trunk was lost. *Held*, company liable: *Logan v. Rd.*, 11 Rob. (L. A.) 24; *Warner v. Rd.*, 22 Iowa 166. The fact of the passenger having paid no extra fare for the carriage of his baggage makes no difference as to the responsibility of the carrier:

Graffam v. B. & M. Rd., 67 Me. 234. But where a passenger left port before her baggage arrived for shipment, and caused the delinquent baggage to be shipped on another vessel, and part of it was lost on such vessel, *Held*, that this was an ordinary case of shipment of goods as freight, and that the shipowners were responsible for the loss of the goods as freight: *The Alvirra Harbeck*, 2 Blatch. 336.

Storage.—The contract of storage at the place of destination is a part of the original contract to carry, and the party liable on the main contract of carriage is liable on the implied contract of storage: *Brownell v. N. Y. C. Rd.*, 45 N. Y. 184. Carriers are liable for baggage left by passengers in charge of their agents, such passengers intending to proceed with the same on the next train, or left for convenience in departing from the place where the baggage is deposited: *C. & A. Rd. v. Belknap*, 11 Cush. 97. It is not necessary that the place of deposit of passengers' baggage in a railroad station be absolutely fire-proof or burglar-proof. It need only be such a place as a man of ordinary prudence might use for the storage of his goods: *C., R. I. & Peoria Rd. v. Fahy*, 52 Ill. 106. After the arrival of a train or ship a reasonable time will be given to passengers to remove their baggage, during which time the carrier will be held liable, as a carrier, for the safety of such baggage. He will be held an insurer of it; but after the expiration of such time, and especially after notice to the passenger to remove his baggage, the carrier's liability as an insurer ceases, and in

place of it the liability of a warehouseman exists. As a warehouseman, however, he is still bound to preserve the baggage with ordinary care, and is responsible if it be lost through his negligence: *Vanhorn v. Kermit*, 4 E. D. Smith 453. Several cases illustrate these propositions: thus where a passenger left for his own convenience his baggage at the station over night, where it was destroyed by accidental fire without the company's fault, it was held not liable: *Ross v. M., K. & T. Rd.*, 4 Mo. App. 583; *Roth v. Rd.*, 34 N. Y. 548; *Louisville Rd. v. Mahan*, 8 Bush 184. In another case a passenger allowed his baggage to remain at the station from ten A. M. until very near the same time next day, and during the day it was the custom of the defendant not to lock up the baggage, but to keep watch over it, and at night it was customarily put under lock and key. The baggage was lost. *Held*, company not liable: *Holdridge v. Rd.*, 56 Barb. 191. A passenger of a steamer having arrived at its destination about twelve o'clock at night left the boat in the morning, which was on Sunday, at a reasonable hour for rising, to visit a friend, with the intention of returning before the boat should return for New York on the next day, and then demanding her trunk, for the purpose of continuing her trip to Boston. When she left the steamboat the trunk had been stored by the boatmen in a baggage-room used by them for such purposes; before she returned the trunk and its contents were destroyed by fire without any negligence on the part of the carriers. *Held*, not liable, being mere bailees: *Jones v. Transportation Co.*, 50 Barb. 193. A valise left for a few hours was lost. *Held*, that this was a case of gratuitous bailment. Defendant was bound to exercise only slight diligence and liable only for gross negligence: *Minor v. C. & N. M. W. Rd.*, 19 Wis. 40; *Louisville Rd. v. Mahan*, 8 Bush 184. And where a passenger

on a railway omitted for three days to demand his baggage. *Held*, that the company's liability as a common carrier had ceased, and they were only liable as warehousemen: *Fairfax v. N. Y. C. Rd.*, 37 N. Y. (S. C.) 516; 43 Id. (S. C.) 18. A trunk was left over night in the common room of defendant's station, instead of being placed in the adjoining baggage-room, where it properly belonged. During the night some unknown person broke into the room, and the trunk, and stole from it certain valuables. *Held*, there being no evidence of any effort to discover the burglar, that defendant was liable as a warehouseman, even if his liability as a common carrier did not still exist: *Warner v. Rd.*, 22 Iowa 166; *Bartholomew v. Rd.*, 53 Ill. 227. A passenger, who was lame, arrived at his destination on the railroad and told the baggage-master that he was lame and unable to take his baggage with him, but that his father would call for it. At this time his father was absent from home, but he returned in about two days, and called for the trunk as soon as he got back. It had been stored by the baggage-master in the room occupied by passengers, where they usually left baggage and allowed baggage to be taken away. At times no one of the company's employees would be present to watch the baggage. There was a warehouse attached to the depot, but the baggage was not placed in it. *Held*, that the company were liable for the loss of it: *Curtis v. Rd.*, 49 Barb. 148. A passenger did not call for his trunk until the second day after his arrival, when it could not be found. The company did not show any proof accounting for the failure to deliver; hence it was *held* that he was entitled to recover: *Burnell v. N. Y. C. Rd.*, 45 N. Y. 184. A passenger, at the expiration of his journey, left his baggage with the baggage-man, asking him if it would be safe there until morning. The baggage-man said, Yes, but

the trunk was lost before 3.30 next morning. *Held*, company liable: *Quimit v. Henshaw*, 35 Vt. 604. See also *Mote v. C. & N. W. Rd.*, 27 Iowa 22; *Fairfax v. N. Y. C. Rd.*, 67 N. Y. 11.

Delivery by Carrier.—Travellers are entitled to require the delivery of their baggage according to the usual course of business: *Quimit v. Henshaw*, 35 Vt. 604. It is the duty of a railway company to have baggage ready for delivery on the platform or other usual place of delivery: *Fatscheider v. G. W. Rd.*, L. R., 3 Ex. Div. 153. Warehousemen are liable for losses occasioned by the innocent mistake of themselves or of their servants in delivering goods to a person not entitled to them: *Waldron v. Rd.*, 1 Dak. Ter. 351. Where a box had nothing to which a check could be attached, and the passenger was informed that it would be just as safe without a check, and started on his journey, relying on this statement, the box having been delivered to a third party without authority, instead of being sent on as contracted: *Held*, that the defendants were liable for the loss of the box: *Waldron v. Rd.*, 1 Dak. Ter. 351. If the carrier claims to have delivered the goods to an agent of the owner or consignee, it must be clearly proved that the person to whom delivery was made was in fact agent and duly authorized as such: *Waldron v. C. & N. W. Rd.*, 1 Dak. Ter. 351. But delivery may be waived by a passenger, and if his baggage be lost after he has waived delivery to himself personally he cannot recover against the carrier. Thus, where a passenger employed a hackman in Boston to carry himself and two trunks to a house on a certain street, at each end of which posts were placed so that a carriage could not enter it, and upon the carrier proposing that the driver should take another man to assist him in carrying the trunks, the passenger said that he would help, and when they arrived at the entrance to the street he went to the house with a valise, leaving

the driver to unload the trunks, and then returned suggesting that they take the heavier trunk first, to which the driver assented, saying: "I will set the other in here," putting the smaller trunk inside the posts, whereupon they went to the house with the larger trunk, and upon their return found that the other trunk was gone. *Held*, that the passenger had waived a delivery of the other trunks at the house: *Patten v. Johnson*, 131 Mass. 297. A passenger, on her arrival at Boston, asked permission to leave her baggage for a short time. She was told by the agent that he could not keep baggage so long with the check on, but that it would be perfectly safe if she gave up her checks, which she did. The baggage was subsequently delivered to one falsely claiming authority to receive it. *Held*, that the defendant's obligation as a carrier was ended, and that the assurance of the agent was not a contract for storage, being, in fact, in clear repugnance to the regulations of the company, and that defendant was not liable: *Mattison v. N. C. Rd.*, 57 N. Y. 552. When baggage arriving at its destination on one road at night, has to be transferred to another road that connects with it, and the former road, on the arrival of the train, has knowledge of the fact that such baggage has to go on by the next train in the morning over the other road, and with this knowledge stores the baggage in its baggage-room until the morning, the owner not objecting, the question as to whose custody the baggage was in during the night is one which depends upon the usual course of business in these matters: *Quimit v. Henshaw*, 35 Vt. 604. The delivery of baggage by a railway company at the end of the passenger's route, either to the passenger or to his authorized agent, ends the liability of the company as a common carrier, but a delivery at the company's terminus to the baggage-master of an independent steamboat company, who by agreement between the railroad and steamboat com-

panies always enters its cars before their arrival at the depot, taking baggage-checks of through-passengers and giving them company's receipts therefor in exchange, will not free the company from liability caused by the larceny of its servants after the delivery to the steamboat baggage-master, unless he were the plaintiff's authorized agent to receive the baggage: *Mobile & Ohio Rd. v. Hopkins*, 41 Ala. 486. A demand for baggage by the passenger is, of course, necessary in order to charge the carrier for the failure to deliver it, but it need not be a demand upon the directors of a corporation which is a common carrier. It is sufficient to make the demand of agents of the company who are charged with the duty of receiving, keeping and delivering passengers' property: *Cass v. Rd.*, 1 E. D. Smith 522. And when the baggage is wrongfully detained the owner may assign his title to the property, and the assignee may make a fresh demand for it, and then maintain an action in the nature of trover.

Right to Regulate the Carriage of Baggage and to Limit Liability therefor.—As a general rule a common carrier cannot even by a special agreement with the owner release himself from liability for his failure to exercise ordinary care in transporting baggage: *C. & A. Rd. v. Baldauf*, 16 Penn. St. 67. He cannot contract for exemption from liability for damages caused by the negligence, wilful default or tort of himself or his servants. This rule applies when he undertakes to transport passengers gratuitously. It also applies to an express stipulation for tickets limiting the carrier's responsibility to a specific sum, as to the value of the baggage: *Mobile & Ohio Rd. v. Hopkins*, 41 Ala. 486. Nevertheless, a carrier of passengers has the right to establish any reasonable regulations which he considers necessary to secure the safety of the baggage of his passengers, and if the passenger knows the regulation, and his baggage is lost, and there is neglect

or refusal to comply with it, the carrier is not answerable: *MacKlin v. N. J. Steamboat Co.*, 7 Abb. Pr. 229. And it may, as an insurer of the property, stipulate against liability for accidents and unavoidable losses: *C., H. & D. & D. M. Rd. v. Pontius*, 19 Ohio St. 221. But public notice by a railroad company that all baggage transported on their road is at the risk of the owners will not exonerate the company from its liability as a carrier: *Logan v. Rd.*, 11 Rob. (La.) 2, 4; *C. & A. Rd. v. Belknap*, 11 Cush. 97; *Jones v. Voorhees*, 10 Ohio 145; *C. & A. Rd. v. Burk*, 13 Wend. 611; *I. & C. Rd. v. Cox*, 29 Ind. 360; *Rd. v. Campbell*, 36 Ohio St. 647; *Nerins v. Bay City Steamboat Co.*, 4 Bosw. 225; *Ransom v. Rd.*, 2 Abb. Pr. (N. S.) 220; *Cohen v. S. E. Rd.*, L. R., 2 Exch. Div. 253; *Williams v. G. W. Rd.*, 10 Exch. 15.

A carrier may stipulate against liability as an insurer for baggage exceeding a fixed amount in value, except additional compensation proportionate to the risk: *Rd. v. Fraloff*, 100 U. S. 24. So he may stipulate that he will not be liable in case of loss for merchandise and jewelry, unless he be notified by the owner that these are in the baggage, and an extra compensation be paid therefor: *Hopkins v. Wescott*, 6 Blatch. 64. So he may relieve himself from liability by fire: *Id.*

Contract or Notice—Construction.—The intention of carriers to limit their liability where it is intended so to do, must be so plainly expressed as to leave no room for doubt as to their meaning. Nothing should remain to be ascertained by construction. Where there is any doubt as to the meaning of a limiting notice, it must be construed strictly as against the carrier: *Hopkins v. Wescott*, 6 Blatch. 64. Knowledge of the limitation must be brought home to the passenger in time for him to leave the car and have his baggage removed before the train leaves. The mere delivery of a ticket to a pas-

senger, with a notice printed on its back or on its face, is not generally sufficient to raise the presumption of actual notice to him before the train leaves: *Wilson v. Chesapeake & Ohio Rd.*, 21 Gratt. 654; *Macklin v. N. J. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229; *Nivens v. Day State Steamboat Co.*, 4 Bosw. 235; *Malone v. Rd.*, 12 Gray 388; *Brown v. Rd.*, 11 Cush. 97. Where baggage is delivered to carriers according to printed conditions posted in various parts of their boat, the consent of passengers to such conditions is not necessary. It is enough that they know them, and that fact being ascertained, compliance with them will be required by law. But it does not follow, from this, that passengers are obliged to read these notices. They are employed by carriers as a means of bringing to passengers' notice any reasonable regulation: *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85. Passengers must be fully informed of the terms and effect of the notice: *C. & A. Rd. v. Baldauf*, 16 Penn. St. 67. It has been held, however, that when a cloak-room ticket has on its face a plain and unequivocal reference to the conditions printed on the back of it, a person taking such a ticket is bound by such conditions, whether he has made himself acquainted with them or not: *Harris v. G. W. Rd.*, 45 L. J., N. S., Q. B. 729. Many instances are given in the books of attempted limitation of liability of carriers for baggage. Thus where a baggage-man came into a car to re-check baggage, and gave plaintiff a receipt for his baggage marked, "Domestic Bill of Lading," by which the carrier was exempted from liability under certain circumstances, which receipt the passenger put in his pocket without reading, the car being dimly lighted, so that plaintiff could not have read it, had he tried to do so. *Held*, that the carrier, in order to limit its liability, must establish a contract containing the special terms contained in the receipt, and that it was proper to

leave to a jury the question whether, under the circumstances, the passenger made such a contract by the acceptance of the receipt: *Madan v. Sherard*, 73 N. Y. 329. Generally, and without special limitation, a carrier is not liable for baggage lost by the act of God or the public enemy; but loss by theft is not within either of these exceptions: *Woods v. Devin*, 13 Ill. 746. The fact that a guard of soldiers is set over a car, which contains munitions or equipments of war, even throughout the journey, does not relieve the carrier from liability where the control and management of the car, as a part of the train, was not interfered with or impeded in any way by such guard: *Hannibal Rd. v. Swift*, 12 Wall. 262. Other cases present instances of limitations of the amount for which the company would be liable: *Pepper v. S. E. Ry.*, 7 L. T. (N. S.) 469; *Steamship Co. v. Shand*, 3 Moore P. C. C. (N. S.) 272; *Harris v. G. W. Rd.*, 45 L. J. (N. S.) 729; *Vantoll v. S. E. Ry.*, 12 C. B. (N. S.) 75; *Steers v. L., N. Y. & P. Steamship Co.*, 57 N. Y. 1.; *Rd. v. Fraloff*, 100 U. S. 24.

Actions—Parties.—A number of cases present the question, "Who has a right to sue for damages occasioned by the loss of or injury to baggage in transit?" When an agent contracts and pays for the carriage of goods in the conduct of their owner's business, and for his account, the action to recover for their loss should properly be brought in the name of the owner: *Slowman v. G. W. Ry.*, 67 N. Y. 208. But where plaintiff gave his valise to his servant to take with him on defendant's railway, the plaintiff himself intending to travel by a later train, and the servant bought his ticket, and the valise in charge of the servant was checked as the servant's personal baggage, and was within the weight allowed him by law as personal baggage, *Held*, that the owner of the baggage was not the proper person to maintain an action against the company for the loss thereof,

although he travelled on the same day and on the same route by a later train: *Becher v. Rd.*, L. R. 5 Q. B. 241. So where a travelling salesman paid his fare as a passenger in a railroad car and committed a trunk containing money belonging to his principal, not exceeding a reasonable amount for travelling expenses, to the agent of the company, but without notice that the trunk contained money, and it was lost, *Held*, that the action would not lie in the name of the principal upon the contract existing between the agent and the carrier: *Weed v. Saratoga & Schen. Rd.*, 19 Wend. 534; *Stimson v. Conn. Rd.*, 78 Mass. 83. Whether a married woman can sue in her own name for the loss of her personal baggage is governed by the law of the place where the remedy is sought. Some cases hold that a married woman may sue for such baggage: *Stoneman v. Erie Rd.*, 52 N. Y. 29; *Fraloff v. N. Y. C. & H. R. Rd.*, 10 Blatch. 16; *Rawson v. Penn. Rd.*, 2 Abb. N. S. 220; *McCormick v. Penn. Rd.*, 49 N. Y. 303. An infant may bring an action by his next friend to recover damage for the loss or injury to his baggage.

Other cases present questions as to who may be sued for the loss of baggage. Thus whether the driver of a cab or the proprietor thereof is liable. A cab plying in London in the ordinary way was hired by the plaintiff to carry his baggage, which was lost by the fault of the driver. On the cab was the name of the defendant, as proprietor of it, which he in fact was. The driver paid each day a certain sum of money to the defendant for the use of the equipage, and made what he could by the transaction. *Held*, under the statute that the driver must be taken to be an agent of the proprietor, with authority to make contracts for the employment of the cab on his account, and that consequently the action was rightly brought against the proprietor: *Powles v. Hyder*, 6 El. & B. 207. A foreign corporation doing business as a carrier

of passengers may be sued in New York to recover the value of lost baggage: *Jones v. Trans. Co.*, 50 Barb. 193. The form of the action may be either in tort or *ex contractu*. An action of tort before a police justice is the proper form of suing for a penalty of \$10, provided by the stat. 1854, c. 23, for the refusal of a railroad company to take the baggage of a company delivered to it for transportation: *Commonwealth v. Rd.*, 15 Gray 447.

Pleadings.—In declaring on the common-law obligation of a common carrier it is only necessary to allege the delivery of the goods to their carrier to be carried by him over the designated route, and that they were received and accepted by him. On these facts the duty arises, for a breach of which the carrier is liable to the shipper: *Wilson v. Chesapeake & Ohio Rd.*, 21 Grat. 654. It must be alleged that the loss occurred through the defendant's negligence: *Candee v. Penn. Rd.*, 21 Wis. 582. The plaintiff need not allege that the baggage was lost without his fault: *Richards v. Wescott*, 2 Bosw. 590. In suits before a justice of the peace it is sufficient to file such a statement of the cause of action as will apprise the defendant of the nature of the demand on such certificate that a second suit cannot be maintained for the same cause of action: *Leelin v. Rd.*, 10 Mo. App. 128. It need not be alleged that the plaintiff went as a passenger, and that the trunk was taken as a part of her baggage: *Wilson v. Chesapeake & Ohio Rd.*, 21 Grat. 654; *Davis v. Rd.*, 10 How. 330. Under an allegation that a hack was unfit for service, evidence is admissible that it was overloaded: *Leimon v. Chancellor*, 68 Mo. 340.

Defences—Merchandise.—The general rule is that the articles for which a railway or other carrier is liable to carry safely as baggage include only such as are necessary to the use, comfort and convenience of the passenger during the journey or immediately thereafter.

What these articles are depends upon the social position of the passenger, length of journey and the country through which or to which the passenger travels. In some respects the rule is comparable to the rule of law which regulates the liability of an infant for necessities, that is, for such articles as he buys that are suitable for his use, having in consideration the social position and standing of the infant. Just so social position is to be considered in determining what is proper baggage for a passenger. Valuable jewels have been considered appropriate baggage for a Russian countess, and would probably be so considered when carried by any person of wealth and high social standing. So the amount of baggage which a person may carry upon a long journey may obviously be greater than if the journey was a short one to an adjacent city or village. One of the limitations of the liability of a carrier arises out of the kind of property carried by the passenger as baggage, as thus, a carrier is not liable for merchandise carried as baggage: for example, for jewelry carried by the commercial traveller of a jewelry house: *Alling v. B. & A. Rd.*, 126 Mass. 121; *Richards v. Wescott*, 2 Bosw. 590; *Collins v. Boston & Maine Rd.*, 10 Cush. 506; *Cahill v. Rd.*, 10 C. B. (N. S.) 154; *Bluemantle v. Fitchburg Rd.*, 127 Mass. 322; *Pardee v. Drew*, 25 Wend. 459; *Belfast, &c., Rd. v. Keys*, 9 H. L. C. 555; *Cahill v. L. & N. W. Rd.*, 13 C. B. N. S. 818; *Cin. & Chic. Air Line Rd. v. Marcus*, 38 Ill. 219; *Stimson v. Conn. River Rd.*, 98 Mass. 83; *Smith v. Rd.*, 44 N. H. 325; *Rd. v. Capps*, 23 Am. L. Reg., N. S., and note. Of course if the railroad company or its agents be informed that the trunk or box of the passenger contains merchandise they may be held liable therefor, having been given notice of its contents and an opportunity to charge extra compensation for the carriage of it, and to take all necessary precautions for its safe preservation. The

fact that commercial travellers or others are accustomed to carry merchandise in passenger trains, they paying the usual price for tickets of a passenger, even if known to the carriers, will not render them liable for such merchandise. The passengers carry it at their own risk: *Alling v. B. & A. Rd.*, 126 Mass. 121. So a railroad company has been held not liable for a watch and handcuffs, locks, medicines, &c., carried by a passenger: *Bomar v. Maxwell*, 9 Humph. 621. But it has been held in at least one case that if the package of merchandise is carried openly or so packed that its nature is obvious, and the carrier does not object to it, he will be liable for the loss of it: *Great North. Ry. v. Shepherd*, 8 Exch. 30. And where a carrier demands and receives compensation as freight for the transportation of the merchandise, he is liable for it as well as for the baggage: *Stoneman v. Rd.*, 12 N. Y. 419; *Ross v. Mo., K. & T. Ry.*, 4 Mo. App. 583. Where plaintiff wished to go from Little Falls, N. Y., to New York city via Albany, and sent his trunk, on the suggestion of the New York Central Railroad Company, from Little Falls to Athens, "via the People's Line of Steamers," to New York, via Albany on the railroad, and the baggage was lost, held: that the railroad company was not liable for it, there being no contract between it and the steamboat company, but simply an occasional transaction of this kind: *Green v. N. Y. Central Rd.*, 12 Abb. Prac. N. S. 473.

A passenger on a railroad informed its agent that his trunk contained merchandise, in addition to his personal baggage, and paid the agent a compensation for the extra weight as demanded, and the trunks were destroyed, and the passenger brought an action to recover for the loss of the baggage, in which the court ruled that he could not recover for the merchandise, but that he could, and in fact, did recover for the baggage. *Held*, in a subsequent action brought to

recover the value of the merchandise lost, that the former action was not a bar, since the two actions were based upon separate contracts: *Millard v. M., K. & T. Rd.*, 86 N. Y. 441.

Evidence.—As a general rule, the agents of a corporation whose duty it is to receive and take care of baggage, are competent persons to testify as to its care, condition and transportation. So a check is competent to prove the receipt of baggage by a carrier. The evidence of any witness who saw the baggage delivered to the carrier will be competent. Questions have been raised as to the competency of the husband or wife to testify as to loss of each other's baggage. Although the general rule is that a wife is not a competent witness in behalf of the husband, where the husband is a party, yet where the husband is plaintiff in a suit for lost baggage, both her testimony and his are admissible, from the overruling necessities of the case. They alone know the contents of the baggage, and must testify as to its value and contents, else the verdict of the jury upon these points would in most cases be mere guess work. In favor of this view see *Dibble v. Brown*, 12 Ga. 217. As to check, see *Hickox v. Rd.*, 31 Conn. 281. Still it has been held that in such a case the wife is not a competent witness: *Smith v. Rd.*, 44 N. H. 325. Some of the old cases hold that in an action against a railroad company to recover damages for the loss of baggage by its negligence, the plaintiff is not a competent witness, although he has no other evidence: *Snow v. Rd.*, 12 Met. 44; *Dill v. Rd.*, 7 Rich. Law (S. C.) 158; *Smith v. Rd.*, Martin's Law 203; *Pettigrew v. Barnum*, 11 Md. 434. In Indiana while the competency of the plaintiff himself was admitted, his *ex parte* affidavit as to the contents and value of the baggage lost was excluded: *Indiana C. Rd. v. Gulick*, 19 Ind. 83. See also *Pudor v. Rd.*, 26 Me. 458. In New York it has been held that the rule

of evidence allowing the plaintiff to prove the value of the contents of his lost trunk by his own oath, is confined to cases in which fraud or wrong is proved by the defendants, and has no application to cases of loss through negligence merely: *Garvey v. Rd.*, 4 Abb. Pr. 171. But probably the rule of law that a passenger is not competent to prove the contents and value of his own trunk has been abrogated by the statute permitting parties to actions to testify therein on their own behalf: *Am. C. Co. v. Cross*, 8 Bush 472; *Jones v. Voorhees*, 10 Ohio 151. In Pennsylvania it has been held that trunks of husband and wife being lost on a journey, both are competent to testify as to the contents and their value, and especially may the wife be assumed usually to have packed the trunk: *McGill v. Rowand*, 3 Penn. St. 451; *I. C. Rd. v. Copeland*, 24 Ill. 332; see *Pettigrew v. Barnum*, 11 Md. 434. In Tennessee the same rule has been affirmed, but limited in its application to personal baggage, and not to merchandise, the delivery of which to the carrier, it was held, must be evidenced by bills of lading: *Johnson v. Stone*, 11 Humph. 419. In Illinois it was held that a person suing a railroad company for the value of lost baggage is only permitted to be a witness in his own case for the purpose of proving the contents of the lost baggage, when no other evidence can be adduced. He may be permitted also to prove the value of the contents, but he should not be allowed to give evidence as to the value of the articles in which the baggage is packed: *Davis v. Michigan So. Rd.*, 22 Ill. 278. To the effect that a passenger may prove the value of the contents of his own baggage, see also *Nolan v. O. & M. Rd.*, 39 Mo. 114; *Doyle v. Kiser*, 6 Ind. 242; *Dibble v. Brown*, 12 Ga. 217; *Merrill v. Grinnell*, 30 N. Y. 549; *Harlow v. Rd.*, 8 Gray 237.

Admissions.—The price paid for a railroad ticket includes the carrying of

baggage, and the recognition by the company issuing the ticket of its validity, is an admission that the check given for the baggage is equally binding: *C., R. I. & P. Rd. v. Fahey*, 52 Ill. 81. A delivery of checks to a connecting carrier is evidence tending to show the delivery of the baggage represented by such checks to said carrier: *Kan. Pac. Rd. v. Mantelle*, 10 Kan. 119. The admissions of the conductor, baggage-master or station-master, as to the manner of the loss, are admissible in evidence against the corporation: *Morse v. Rd.*, 6 Gray 450. But probably such admissions would be required to have been made so near the time of the loss or damage to the baggage as to be part of the *res gestæ*: *Rd. v. Campbell*, 36 Ohio St. 649; *Curtis v. Rd.*, 49 Barb. 148. A statement made to the plaintiff by the superintendent of a railroad company on presentation of plaintiff's claim that the claim was a "good one," constituted no part of the *res gestæ*, but related to a past transaction, and was held inadmissible as evidence against the railroad company: *Green v. N. Y. C. Rd.*, 12 Abb. Pr. N. S. 473.

In an action against a railroad company to recover the value of a trunk and its contents alleged to have belonged to the plaintiff as a passenger, and to have been lost by the company, the evidence tended to show that the trunk belonged to a third person who took it away from the depot without the knowledge of the agent of the company, and then procured the plaintiff to bring suit for its recovery. The evidence tending thus to show the community of interest and design between the plaintiff and such third person: held, that a letter written by the latter to a stranger to the transaction going to show the conspiracy was admissible in evidence against the plaintiff: *C., R. I. & P. Rd. v. Collins*, 501 Ill. 212.

Presumptions.—In the absence of proof of any contract on the part of the carrier

to carry a passenger and baggage to any particular place or city in the carrier's port of destination, it will be presumed that the carrier undertook to transport the passenger and baggage to the place in the port fixed by the established usage and custom of the carrier for the landing of its passengers and their baggage: *Klein v. Packett Co.*, 8 Daly 390. So, assent to conditions affecting liability is presumed from the acceptance of a carrier's receipt or bill of lading: *Steers v. L., N. Y. & P. Steamboat Co.*, 57 N. Y. 1. That the loss of a trunk is presumed to have been evidence of the negligence or fraud of the carrier or its agent: *C. & A. Rd. v. Baldauf*, 16 Penn. 67. See also *Fairfax v. N. Y. C. & H. R. Rd.*, 37 N. Y. 516; *Brownells v. N. Y. C. Rd.*, 46 N. Y. 184. But see *Stimson v. Conn. River Rd.*, 98 Mass. 83; *Smith v. Rd.*, 44 N. H. 325. The court may take judicial notice of established railroad routes generally known and used: *Fairfax v. N. Y. C. Rd.*, 37 N. Y. (S. C.) 516.

Miscellaneous Instances.—To justify a common carrier in his defence that he had limited his liability substantially by notice brought home to the knowledge of the plaintiff, the evidence must show not only that the plaintiff had his attention called to the carrier's notice, limiting his liability in certain expressed contingencies, but it must also appear that the passengers assented to the terms and conditions of the notice: *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225. The possession of checks by a passenger, and the testimony of the baggage-master that when required by passengers he put checks on their baggage, giving the duplicates to the passenger, is enough to prove that the plaintiff was a passenger, and that his baggage was checked: *Davis v. C. S. Rd.*, 10 How. Pr. 330. So it has been intimated by Judge WOODRUFF that if a passenger's residence, business, station in life, place from whence he came and whither

he was going, and the fact whether he was a rich or a poor man, and where he had been travelling, were matters which affect the carrier's liability; they should have been shown by actual evidence to have been brought within the knowledge of the carrier when it undertook to carry the plaintiff: *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225. Proof of the general care with which the baggage-room and its contents were guarded is not sufficient to establish conclusively that there was no want of care in the particular instance on trial: *Fairfax v. N. Y. C. Rd.*, 67 N. Y. 11. Where there is no proof that plaintiff is a surgeon or physician, or student of medicine, he cannot recover for the loss of a case of surgical instruments: *Giles v. Fauntleroy*, 13 Md. 136. The mere fact of a traveller who has secured a stateroom choosing at first to wear his overcoat rather than deposit it in the stateroom in the custody of the defendant, is no indication that he intends to hold the overcoat in his possession during the whole trip: *Gore v. Norwich Trans. Co.*, 2 Daly 254. The words "personal baggage," written in pencil on the margin of a receipt for goods to be shipped on an ocean voyage, there being no evidence as to when and by whom said pencil marks were written, does not alter the fact that the goods thus shipped without the owner accompanying them are freight, and not personal baggage: *Re Alvira Harbeck*, 2 Blatch. 236. Evidence that passengers other than the plaintiff were allowed by the defendant railroad company to take with them, as passengers, bundles of merchandise, and without objection on the part of defendant, has no legal tendency to an agreement that they were to be regarded as a

part of their baggage and paid for by the passenger's ticket, or were to be taken at the risk of the company: *Smith v. Rd.*, 44 N. H. 325.

Damages—Measure.—The usual contract of a carrier of passengers includes an undertaking to receive and transfer their baggage. If nothing be said about it and if the baggage be lost, even without the fault of the carrier, he is responsible for it. The actual damages arising from the breach is the measure of damages in this form of action: *Mississippi Rd. v. Kennedy*, 41 Miss. 671. Damages cannot be recovered for expenses in searching for lost baggage: *Texas & P. Rd. v. Ferguson*, 9 A. & E. Railroad Cas. 395. The market value of the articles lost is deemed an ultimate compensation, and this is the proper measure of the right of recovery: *Texas & P. Rd. v. Ferguson*, 9 A. & E. Railroad Cas. 395. Where money is lost in a trunk the passenger can only recover for so much money as was necessary for his personal use and travelling expenses during the journey: *Hickox v. Rd.*, 31 Conn. 281. In the absence of proof as to the contents of a trunk and their value, damages may be given by the jury proportionately to the value of the articles which they, in their judgment, think the trunk did and might fairly contain: *Dill v. Rd.*, 7 Rich. Law (S. C.) 158. It is an error to instruct a jury in a suit for damages against a railroad company, in which exemplary damages are claimed, to return a verdict for such damages which they believe, from the evidence, the plaintiff is entitled to, without furnishing a rule for their guidance in discriminating between actual and exemplary damages: *G., H. & S. A. Rd. v. Dunlavy*, 56 Texas 256.

ADELBERT HAMILTON.

RECENT AMERICAN DECISIONS.

Court of Errors and Appeals of Maryland.

MARY E. TWIGG AND JESSE TWIGG, HER HUSBAND, v. A. J. RYLAND.

Any one owning or keeping an animal that he knows to be of a ferocious disposition, accustomed to attack or bite mankind, is bound to restrain such animal at his peril.

Allowing a dog to be kept on the premises does not render the owner of the premises liable for injuries inflicted by the dog away from the premises if such owner did not own or have control of the dog.

The onus is on the plaintiff to prove the knowledge of the owner or keeper of the vicious propensities of the animal, if it be of a domestic nature, though it is otherwise where it is of a wild and untamable nature.

Knowledge of a servant or wife is not knowledge of the owner or keeper, unless it be a servant who has general charge of the keeping of the animal.

To charge the defendant he must be shown to have knowledge that the animal is inclined to do the particular kind of mischief that has been done.

THIS was an action brought by the appellants in the court below to recover damages for injuries from the bite of a dog. The facts are sufficiently stated in the opinion.

G. W. Thomas and A. B. McKaig, for appellants.

J. A. McHenry, Wm. M. Price and H. K. Douglas, for appellees.

The opinion of the court was delivered by

ALVEY, J.—The appellants in this case were the plaintiffs below, and they brought the action to recover of the defendant for injuries received, by the female plaintiff, by the bite of a dog, alleged to have belonged to or to have been kept by the defendant, with knowledge that the dog was ferocious and dangerous.

In regard to the law of the case it is well settled that if any person keeps an animal, *mansuetæ naturæ*, of a ferocious or vicious disposition, accustomed to bite or attack mankind, knowing that it is possessed of such disposition or vicious propensity, he is bound to restrain such animal, at his peril; and if he allows it to escape or go at large he is liable for all the injury it may inflict by attacking persons in consequence of such ferocious propensity.

As declared by the Queen's Bench in *May v. Burdett*, 9 Q. B. 101, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case, at the suit of any person attacked

and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities."

The owner or keeper of the dog or other domestic animal must be shown to have had knowledge of its disposition to commit such injury, and the burden of proving this fact is on the plaintiff, though it would be otherwise if the animal was of a nature to be fierce and untamable, such as bears, tigers, etc.: *Spring Co. v. Edgar*, 99 U. S. 654.

The notice which will charge the owner or keeper with liability for the vicious conduct of the animal must be notice that it was inclined to do the particular mischief that had been done. Hence, notice that a dog is ferociously disposed toward cattle is no notice that he will attack persons. It is not necessary to show that the owner or keeper of a vicious dog has seen the animal attack mankind; but it is sufficient to show that the vicious propensity of the animal has in some way been brought to the knowledge of the owner or keeper, so as to admonish him to take the necessary precaution to prevent injury in the future. Hence, the question in each case is whether the notice was sufficient to put the owner or keeper on his guard, and to require him to anticipate the injury that has actually been done. And this duty of guarding against the vicious propensity of a dog or other domestic animal is imposed upon the keeper thereof, irrespective of the fact of ownership: *Cooley on Torts* 344.

The question presented by the first bill of exception is as to the admissibility of evidence to prove the *scienter*. After giving evidence of the injury inflicted by the dog, the plaintiffs gave evidence to prove that the defendant was a butcher in Cumberland and that he had about his premises a colored man as an assistant, who drove the meat wagon and delivered meat to the customers of the defendant, and that the dog was frequently with him and generally followed him. They then offered to prove that this colored man knew that the dog was vicious and dangerous, and was disposed to attack and bite and injure persons, and that such colored man while in the employ of the defendant had told one of the plaintiff's witnesses that he had made known to the defendant, before the injury to the plaintiff, that the dog was of a vicious disposition, and had attacked and bitten other persons. To this offer the defendant

objected, and the objection was sustained by the court, and as we think, rightly sustained.

It is very true, as shown by the authorities, that if the owner of a dog place it in the charge and keeping of a servant, the servant's knowledge of the dog's ferocious disposition is the knowledge of the master; but it is not true that the knowledge of any servant that a dog may follow or be with about the premises where he is employed, as to the disposition of the dog, is to be imputed to the master. This is clear upon all the authorities.

The case that goes as far upon this question as any other to be found in the reports, and which has been mainly relied on by the appellants, is that of *Gladman v. Johnson*, 86 L. J. (C. P.) 153, where notice of the mischievous propensity of the dog, given to the wife of the defendant, who attended to the business of her husband in his absence, for the purpose of being communicated to the husband, was held to be some evidence of a *scienter* to be considered by the jury.

But in delivering judgment in that case, BOVILL, C. J., says: "I am not prepared to assent to the proposition that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant, in such an action as this, with knowledge of the mischievous propensity of the dog. But here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife, when on the premises, and for the purpose of being communicated to her husband. It may be that this is but slight evidence of the *scienter*, but the only question is whether it is evidence of it. I think it is."

This case was referred to and commented upon in *Good v. Martin*, 57 Md. 610, 611. And in the case of *Stiles v. Cardiff St. Nav. Co.*, 33 L. J. (Q. B.) 319, where a similar question arose, the Lord Chief Justice said that notice of the vicious propensity of the dog given to porters or servants employed about the premises would not suffice; but that if brought home to a person who had the general management of the yard in which the defendants themselves could not be supposed to be acting, and who had authority to say whether a dog should be kept there or not, or whether it should be chained up or not, it would be otherwise.

The case of *Baldwin v. Casella*, L. R., 7 Exch. 325, proceeded upon the ground that the defendant had deputed to his coachman

the care and control of the dog, and therefore a notice to him of the vicious nature or propensity of the dog was notice to the master. And there is nothing in the case of *Appleton v. Percy*, L. R., 9 C. P. 647, that in any way contravenes the principle of the previous cases to which we have referred. We are clearly of opinion, therefore, upon the facts as stated in the bill of exception, that the knowledge, whatever it may have been, of the negro man, in regard to the propensity of the dog, was not legally imputable to the defendant; and especially were not the declarations of the negro man evidence against the defendant. The man himself should have been called as witness.

Of the several prayers offered by the plaintiffs, those granted would seem to have given the plaintiffs the benefit of all the law to which they were entitled, and that, too, in a most liberal form; and those rejected were clearly erroneous, and therefore properly rejected. The fourth and fifth prayers rejected by the court appeared to have been based entirely upon the evidence that was offered, but which was excluded by the court upon objection.

The evidence not being before the jury, of course it could not be made the basis of an instruction to them. Besides, those prayers did not even require the jury to find that the vicious disposition of the dog was to attack and injure mankind, but simply that the dog was of vicious or dangerous propensities. This alone was a defect which made them misleading, and therefore required their rejection. *Judge v. Cox*, 1 Stark. 285; Wood on Law of Nuisances, § 761.

The seventh prayer asked the court to say that there was no sufficient evidence to be submitted to the jury, of any contributory negligence on the part of the female plaintiff in bringing about the injury complained of, to defeat the right to recover. The prayer was properly rejected; for although the evidence is manifestly very meagerly and defectively set out in the record as to the precise circumstances of the injury, yet it is stated in a general way that evidence was given "tending to prove that the plaintiff (Mary) knew the said dog, and knew that he was a dog liable to attack persons, and was of a fierce disposition, and that she had encouraged the dog to be in and about her premises prior to said injuries." If she had cultivated a familiarity with the dog, and encouraged him to come to her house and be about her, with knowledge of his disposition, it was certainly evidence to go the jury upon the subject

of contributory negligence on her part, and the court was therefore right in refusing the prayer.

The first prayer on the part of the defendant, which was granted, we do not understand to be seriously questioned. But the third and fourth prayers of the defendant, which were granted by the court, are questioned by the plaintiffs. The third prayer sought to preclude the right to recover upon the ground of contributory negligence on the part of the female plaintiff, Mary, and if the facts therein enumerated were found by the jury, they certainly constituted a good ground of defence. Cooley on Torts 346.

In granting the fifth prayer, the jury were instructed that if they found that the dog committing the injury did not belong to the defendant, but was at the time the exclusive property of the defendant's son, a young man over twenty-one years of age, and that the latter "had sole charge, custody, and control of said dog, and that the defendants never had the custody, care or control of said dog, and that the injury complained of occurred off the premises of the defendant, and upon the premises of the plaintiff, Mary E., a half mile away," then the defendant was not liable, although the jury might "find that the defendant allowed said dog to be kept by his son on or about his premises." This instruction we think unobjectionable. The defendant, to be liable for the vicious conduct of the dog, must have been either owner or keeper of the animal, or had some control of him. If he was neither owner or keeper, and had no control of the dog, and the injury was done away from his premises and out of his presence, it is difficult to perceive upon what principle he could be held liable.

In the case of *Auchmuty v. Ham*, 1 Denio 495, where the damage was done by the dog away from the premises of the defendant, it was held not to be sufficient to render the defendant liable, that the dog belonged to the defendant's hired man-servant, who kept the dog at the defendant's house during the day but took him away at night.

The principle of that case would seem to apply fully to this, and be an authority for granting the fifth prayer of the defendant, if any authority were needed.

Finding no error in the rulings of the court below, we must affirm the judgment.

The keeper of animals *feræ naturæ*, *facit* liable without notice for any damage such as lions, tigers and the like, is *prima facie* liable without notice for any damage that one may receive from them.

And in such case, it is not necessary for the plaintiff in his declaration to aver negligence in the owner or keeper, for the reason, that such animals are by nature fierce and dangerous, and their owner is supposed to be acquainted with their nature. See *Congress Spring Co. v. Edgar*, 99 U. S. 645; the leading case of *May v. Burdett*, 9 Q. B. (N. S.) 101; and the cases cited below.

The owner or keeper of animals *mansuete naturæ*, such as horses, oxen, cows, sheep, swine, dogs, etc., can on the other hand only be rendered liable by proving notice of their mischievous propensities, and such notice must be averred in the declaration.

There is, however, no distinction between the cases of keeping an animal which breaks through the ordinary tameness of its nature and becomes fierce, and is known by its owner or keeper to be so, and the keeping of one, *feræ naturæ*: *Jackson v. Smithson*, 15 M. & W. 563; s. o. 15 L. J. Ex. 311; *Popplewell v. Pierce*, 10 Cush. 509. *Prima facie* he who keeps a dog or any other animal which is ordinarily of a quiet and domestic nature, after notice that such animal has done hurt, has exhibited a fierce and threatening disposition towards or has made an attack upon a person, biting or injuring him, is thereupon made liable in an action for damages: *May v. Burdett*, 9 Q. B. (N. S.) 101; *Congress Spring Co. v. Edgar*, 99 U. S. 645; *Perkins v. Mossman*, 44 N. J. L. 579; *Pickering v. Orange*, 1 Ill. 338; *Kightlinger v. Egan*, 75 Id. 141; s. c. 64 Id. 235; *Wormley v. Gregg*, 65 Id. 251; *Parlow v. Haggarty*, 35 Ind. 178; *Durden v. Barnett*, 7 Ala. 169; *Marsh v. Jones*, 21 Vt. 378; *Dearth v. Baker*, 22 Wis. 73; *McCaskill v. Elliot*, 5 Strob. 196; *Murray v. Young*, 12 Bush 337; *Barclay v. Leonard*, 4 Den. 500; *Campbell v. Brown*, 19 Penn. St. 359. Most of the cases above cited lay down the rule, that the gist of the action is the keeping with notice or

knowledge of the vicious propensity, and that an averment of negligence in the declaration is not necessary. The following cases are explicit upon this point; *May v. Burdett*, *supra*; *Congress Spring Co. v. Edgar*, *supra*; *Campbell v. Brown*, *supra*; *Poppenwell v. Pierce*, *supra*; *Jackson v. Smithson*, *supra*; *Durden v. Barnett*, 7 Ala. 169.

A man may keep a dog, which he knows is disposed to bite, but in such keeping he takes upon himself all risks, and renders himself liable for all injuries sustained by persons pursuing their ordinary callings: *Logue v. Link*; 4 E. D. Smith 63; *Kelly v. Tilton*, 3 Keyes 263; *Stumps v. Kelley*, 22 Ill. 140.

Negligence of the owner of an animal will likewise render him liable; and when negligence is averred, it will not be necessary to aver knowledge of mischievous propensities. See *Dickson v. McCoy*, 39 N. Y. 400; *Fallon v. O'Brien*, 12 R. I. 518; *Goodman v. Gray*, 15 Penn. St. 188, where it was held that the owner of a horse who voluntarily permits it to go at large in the streets of a populous city, is answerable to an individual who is kicked, without proof that he knew it was vicious. To the same point, see *Dickson v. McCoy*, 39 N. Y. 401.

As to the extent of the knowledge or notice that will charge the owner or keeper, it would seem that notice of facts which would put a careful and prudent man upon his guard, or upon inquiry, is sufficient notice. Under a count alleging a ferocious and dangerous disposition in a dog, proof of a knowledge of a dangerous propensity of the animal has been held sufficient: *McCaskill v. Elliot*, 5 Strob. 196. In the words of the court, per WARDLAW, J., "To require that a plaintiff before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of

the thing to be proved in addition to one of the means of proof."

Notice to the defendant of mischief to mankind on a single previous occasion is sufficient. See *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, 16 N. H. 77; *Smith v. Pelah*, 2 Stra. 1264. Where the owner of a dog which has bitten other persons, has notice of the fact and afterwards suffers him to be at large, and he bites the plaintiff, it is no answer to the plaintiff's action that the dog was generally inoffensive. *Buckley v. Leonard*, 4 Den. 500.

Knowledge that a dog allowed to run at large was of a savage and ferocious

disposition is not, however, of itself sufficient to make the owner liable to one bitten by the dog. To charge the owner he must have had knowledge of the dog's propensity to bite mankind: *Keighlinger v. Egan*, *supra*.

If the mere reading of the principal case were not sufficient to convince one of its correctness, as it would seem it must, the cases above cited must render its correctness beyond question. On the whole it is a very well considered case and entirely satisfactory both on principle and authority.

M. D. EWELL.

Chicago.

United States Circuit Court; District of Oregon.

DUNDEE MORTGAGE AND TRUST INVESTMENT CO. v. HUGHES.

An attorney employed by a mortgagee to examine the security, and who gives his client a certificate of title, is not liable to a subsequent assignee of the mortgage for loss by reason of error in the certificate.

A. applied to a money lender for a loan of \$3000, and offered his note therefor, secured by a mortgage on certain real property; B., the attorney of the money lender, examined the title to the real property and furnished the latter a certificate to the effect that A.'s title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently, and before the maturity of the note, it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was incumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by \$4794.35. *Held*, that there was no privity of contract between B. and the plaintiff, and that he was not liable to the latter for the loss.

DEMURRER to complaint.

William H. Effinger, for plaintiff.

The defendant *in propria personæ*.

The facts are stated in the opinion, which was delivered by

DEADY, J.—This action is brought to recover, among other things, damages to the amount of \$5312.35, for losses alleged to have been sustained on two loans on note and mortgage, amounting to \$3300, upon the certificate of the defendant, as an attorney at law, concerning the title of the borrower to the mortgaged premises and the

condition of his estate therein. From what I conceive to be the legal effect of the statement of the first cause of action in the complaint as amended, it appears that "about" April 28th 1877, the Oregon and Washington Trust Investment Company was a corporation formed under the laws of Great Britain, and resident in Dundee, Scotland, and engaged in loaning money in Oregon upon note and mortgage; that the defendant, who was then a practising attorney in this state, was employed by said corporation to examine the title and condition of the real property offered as security by any one applying to said corporation for a loan; that at this time a loan of \$3000 was made by said corporation to C. W. Shaw, on his promissory note, payable to its order on June 1st 1882, with interest, at the rate of ten per centum per annum, and secured by a mortgage on certain real property then owned by said Shaw, upon which the defendant certified there was no prior lien or encumbrance; that on December 19th 1879, said corporation "amalgamated" with the plaintiff, and "assigned" thereto "all its mortgages," including "all claim, right and interest to or in or growing out of this loan to Shaw," and plaintiff is now "the owner and holder thereof," of which the defendant had notice; that in 1882 the plaintiff requested the defendant "to foreclose said mortgage," and in the course of the proceeding therefor it was ascertained and determined by the decree of this court that the same was subject to a prior mortgage on the premises, so that the whole amount realized by the plaintiff on said loan was \$938.25; and that said Shaw is insolvent. The second cause of action, as appears from the original complaint, is upon a certificate given by the defendant to the Oregon and Washington Savings Bank, another British corporation engaged in loaning money in Oregon on note and mortgage, as to the title of property taken by said corporation, as a security for a loan of \$300 made to H. H. Howard on November 27th 1876, on his promissory note payable on December 1st 1877, with interest at the rate of twelve per centum per annum, to the effect that said Howard was the owner in fee of the same, and that it was unencumbered; that in 1883 said corporation "found out" that said property was not owned by said Howard, so that the whole amount of said loan was lost; that Howard is insolvent, and the plaintiff is now "the assignee" and "owner" of all the "assets" of said corporation. The defendant demurs to both these statements,

for that they do not contain facts sufficient to constitute a cause of action.

In the first statement it is alleged that the loss arising from the insufficiency of the security for the loan was sustained by the Oregon and Washington Trust Investment Company, and that the defendant now owes to said corporation the full amount thereof, to wit, \$4794.35; and it is also alleged that the plaintiff is now "the owner and holder" of the mortgage, notwithstanding it appears that the same has been "foreclosed" and merged in a decree of this court and partly satisfied from the proceeds of the mortgaged premises; and notwithstanding the further allegation that the defendant "now owes" the amount of this loss to the Oregon and Washington Trust Investment Company. But none of these contradictory allegations are admitted by the demurrer, except such as the law adjudges to be true (*Freeman v. Frank*, 10 Abb. Pr. 370), and those which are mere conclusions of law are not thereby admitted at all: *Branham v. The Mayor, etc.*, 24 Cal. 602; *Hall v. Bartlett*, 9 Barb. 297. This action is brought upon the hypothesis that the defendant is now liable to the plaintiff for this loss, but the allegation that he "now owes" the amount thereof to the Oregon and Washington Trust Investment Company is utterly at variance therewith. He cannot be liable on this account to both of them at the same time.

Again, it is alleged that the defendant "guaranteed" that the Shaw property was clear of encumbrance. But this is a mere conclusion of law, and the facts stated do not support it. Upon these, the transaction is simply an employment of the defendant by the Oregon and Washington Trust Investment Company to examine and report upon the title and condition of real property offered as security for a loan by the latter. *Prima facie* there is no element of a guaranty involved in such employment. The defendant only undertook to bring to the discharge of his duty reasonable skill and diligence. He did not warrant or guaranty the correctness of his work any more than a physician or a mechanic does.

It is admitted that if the Oregon and Washington Trust Investment Company had sustained a loss by the negligence or want of skill on the part of the defendant in this matter, the right to recover damages for the same might be assigned to the plaintiff, and it could maintain an action thereon. But taking the facts of the case according to their legal import, and construing contradictory allegations

according to the law of the case, the plaintiff does not sue as the assignee of a cause of action accruing to the Oregon and Washington Trust Investment Company during its existence and ownership of the Shaw note and mortgage. The only thing assigned by the latter was this note and mortgage, and, nothing appearing to the contrary, presumably the consideration therefor was equal to its par value. It does not appear, then, that the assignor ever lost anything by reason of the incorrectness of the defendant's certificate. Nor could the insufficiency of the surety be absolutely, if at all, determined until the maturity of the note in 1882, while the assignment to the plaintiff was made in 1879.

The only question, then, really in this case is whether the defendant is liable, on this certificate, to any one but his employer, the Oregon and Washington Trust Investment Company. The defendant maintains that he is not, while the plaintiff contends he is; not on the ground of privity of contract between them, or that it was aware of the existence of the certificate, or ever acted on it, or was misled by it, but on the ground that the certificate was a necessary preliminary to the contract of loaning, and therefore an integral part of that contract, operating, of course, as an assurance or security to the person about to make the loan, but as much a part of the transaction as the mortgage itself. This question has been decided by the Supreme Court in *Savings Bank v. Ward*, 100 U. S. 195. The case was this: A., an attorney employed by B. to examine and report on the title of the latter to a certain lot of ground, certified that it was "good," upon which certificate B. procured a loan from C., and gave a mortgage on the property as security. It turned out that B. had parted with the title to the property prior to the date of the certificate—a fact that, in the exercise of reasonable care, might have been learned from the records. The security having proved worthless, and B. being insolvent, C. lost his money, and brought suit against A. for damages. The court *held*, in the language of the syllabus, "that there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate." True, Mr. Chief Justice WAITE, with whom concurred Justices SWAYNE and BRADLEY, delivered a dissenting opinion; not upon the general question, however, but on the special ground that it appeared that A. gave his client the certificate in question with knowledge, or reason to

know, that he intended to use it in a business transaction with a third person, as evidence of the facts contained therein, and was therefore liable to such person for any loss resulting from a reliance on such certificate, in any particular, which might have been prevented by the exercise of ordinary care and skill on the part of A. But this is not the case. The defendant prepared this certificate at the instance and for the use of his client, the Oregon and Washington Trust Investment Company, and none other. Nor was there anything in the nature of the business that informed him or gave him any reason to believe that any other person would be called upon to act upon it, or part with any right or thing of value on the strength of the representations contained in it. Such a certificate made at the instance of the owner of the property may be used to influence a third person to make a loan thereon; but a certificate made for the information of the lender is presumably made for his use alone, and when the loan is made and the security accepted it is *functus officio* — has performed its office. The defendant is liable to the Oregon and Washington Trust Investment Company for any loss sustained by it on account of any error or mistake in the certificate, arising from a want of ordinary professional skill and care in the preparation of it, and not otherwise. But he is not so liable to the plaintiff, or any third person. There is no privity of contract between them, or any relation whatever.

The ruling is also maintained in *Houseman v. Girard M. B. & L. Association*, 81 Penn. St. 256, in which it was held that the recorder of deeds is liable in damages for a false certificate of title, but only to the party who employs him to make the search, and not to his assignee or alienee. And in *Winterbottom v. Wright*, 10 M. & W. (Exch.) 109, it was held that although the maker of a carriage is liable to the person for whom he makes it, for any loss or injury arising directly from negligence in its construction, he is not so liable to any third person who may use the same, for the reason there is no privity of contract between them.

The statement of the second cause of action is of the same character as the first; and it is also defective in not stating absolutely that the certificate is untrue. The allegation that in 1883 the bank "found out" that Howard did not own the property, is not in form or effect an averment that he did not own the same and had not title thereto at the date of the certificate. It does not appear to

have been "found out" in any judicial proceeding that the certificate was untrue in this respect; and while it may, nevertheless, be shown in this action to be a fact, it must first be alleged, so that issue can be taken on it. Because in 1883 the bank was of the opinion that Howard had no title to the land, that did not make it so, and the statement of that irrelevant matter is not an allegation by the plaintiff that he was not the owner thereof. Neither does it appear that the bank ever made any assignment of this note and mortgage to the plaintiff or of and claim that may have accrued to it against the defendant for a loss sustained by it on account of any error in this certificate. The allegation that the plaintiff is now the "assignee" and "owner" of the "assets" of the bank is far too vague and indefinite to include this note and mortgage, or such claim, if there is one. The owner of what "assets?" For aught that appears, the bank may have parted with this note and demand before the plaintiff became the owner of its assets. Unless it is shown when the assignment was made and that the bank was then the owner of this "asset," the plaintiff does not show itself entitled to maintain the action, even upon its theory of the law and the defendant's liability. The allegation that the plaintiff is "now" the assignee and owner of the assets of the bank, implies, it is true, an assignment at some time, but it cannot be assumed in favor of the plaintiff that it was more than a day before the commencement of this action—January 9, 1884. But there is no direct allegation in the statement of any loss on the mortgage or of the facts necessary to show one. The statement that the loan was lost to the bank, appears to be a mere inference from the fact that the bank was of the opinion that the mortgagee had no title. And if there was such allegation, and it appeared therefrom that the loss was sustained by the plaintiff, the defendant is not liable for it; while if it was sustained by the bank the defendant is not liable to the plaintiff therefor, unless it should further appear that the right of action thereon has been duly assigned to it.

The demurrer is sustained to both statements.

**LIABILITY OF ATTORNEY TO CLIENT—
ADVICE AS TO TITLES.**

Duty of Attorney.—Attorneys employed by the purchasers of real property to investigate the grantor's title, prior to the purchase, impliedly contract to exercise reasonable care and skill in the perform-

ance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill: Addison on Contracts, 8th

ed., 593; *Savings Bank v. Ward*, 100 U. S. 195.

Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is a safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such negligence or want of care and skill, he shall be responsible to them for the consequences of such loss: Addison on Torts (Dudley & Baylies's ed.) 499; *Howell v. Young*, 5 B. & C. 259; *Watson v. Muirhead*, 57 Penn. St. 161.

So if a person engages in the business of searching the public records, examining titles to real estate, and making abstracts thereof, for compensation, the law will imply that he assumes to possess the requisite skill and knowledge, and that he undertakes to use due and ordinary care in the performance of the duty, and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover: *Clark v. Marshall*, 34 Mo. 429; *Chase v. Heaney*, 70 Ill. 270. See Story on Bailments, sec. 431.

If the attorney certifies that the security is a good one, he thereby warrants that the title shall not only be found good at the end of a contested litigation, but that it is free from any palpable grave doubts or question as to its validity: *Page v. Trutch*, 3 Cent. Law J. 559; s. c. 8 Chicago Leg. News 385.

The examiner of a title cannot limit his liability by an obscure certificate, without specially calling the attention of the other party to it. If he discovers that he cannot furnish a complete and reliable abstract, it is his duty to give the other party notice of the fact, that he may apply elsewhere; otherwise such other party will have a right to rely on his competency and fidelity: *Chase v.*

Heaney, 70 Ill. 270. But by giving a certificate of title he does not become an indemnitor. He is liable for lack of due care or diligence, and for ignorance of his business: *Rankin v. Schaffer*, 4 Mo App. 108.

The specific employment of an attorney to examine a title does not in itself include the duty or obligation to satisfy liens; it is discharged by truly ascertaining and reporting them: *Josephthal v. Heyman*, 2 Abb. N. C. 22.

Said the court, in *Dodd v. Williams*, 3 Mo. App. 278: "What is a lien on real estate may be a difficult question, in some cases, to decide; but an examiner of title is bound to know the state of the law on the subject, at least sufficiently to put him on his guard; and where there may be a reasonable doubt as to whether such or such a recorded instrument is a lien, if he choose to resolve the doubt he does so at his peril."

Whenever the attorney of a proposed mortgagee has reason to suspect that the intended mortgagor has been bankrupt or insolvent, it is the duty of the attorney to make proper searches to ascertain the fact, and he is guilty of negligence for not doing so: *Cooper v. Stephenson*, 21 L. J. (N. S.) Q. B. 292.

Where an attorney acts for a client who advances money on a legacy given under a will to the borrower, he is not justified in relying upon a partial extract from the will furnished by his client, unless the latter agrees to take the responsibility on himself: *Wilson v. Tucker*, 3 Stark 154. If the examiner incorrectly states the quantity of land previously conveyed, he will be liable: *Clark v. Marshall*, 34 Mo. 429.

Privity of Contract Necessary.—In *Savings Bank v. Ward*, 100 U. S. 195, referred to in the principal case: A., an attorney employed and paid solely by B. to examine and report on the title of the latter to a certain lot of land, gave over his signature this certificate: "B.'s title to the lot" (describing it) "is good,

and the property is unencumbered." C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing, by way of security therefor, a deed of trust for the lot. B., before employing A., had transferred the lot in fee by a duly recorded conveyance, a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care. The money loaned was not paid, and B. being insolvent, it was held, there being neither fraud, collusion, or falsehood by A., no privity of contract between him and C., he was not liable to the latter for any loss sustained by reason of the certificate. See *Fish v. Kelly*, 17 C. B. (N. S.) 194; *Day v. Reynolds*, 23 Hun 131; s. c. 11 N. Y. Weekly Dig. 196; *Commonwealth v. Harmer*, 6 Phila. 90.

A., B. & C. were employed in a manufacturing business in which secrecy was essential; and to insure their fidelity, they were required to execute deeds under which a portion of their wages was to be invested in the name of a trustee, with a stipulation for determining the engagement on giving two months' notice, at the expiration of which, in the case of B. and C., the money so invested was to be paid over to them, but in the case of A., the deed was so framed as to make it payable only to his executors on his death. D., the attorney for the employers, being upon the premises, was asked by A. if he would receive his money if he gave notice to quit the service; whereupon D. (not recollecting that A.'s deed differed in this respect from those of B. and C., though he himself drew them all and had them in his custody) answered in the affirmative. Upon receiving this information, A. gave notice, but afterwards discovered that the money invested for him could only be paid to his executors. Held, that A. could not maintain an action against D. for the loss and disappointment sustained

by him in consequence of his acting upon D.'s mistake: *Fish v. Kelly*, *supra*.

It would seem that the rule as to privity of contract should, in some instances, be modified. In *Savings Bank v. Ward*, *supra*, Mr. Chief Justice WAITE, with whom concurred Mr. Justice SWAYNE and Mr. Justice BRADLEY, in a dissenting opinion, said: "I think, if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person, relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found."

Instances of Liability.—In *Allen v. Clark*, 7 L. T. (N. S.) 781; 11 Weekly R. 304, the plaintiff entered into a contract for the purchase of certain household property under certain conditions of sale, one of which was that the purchaser should take an under-lease, "according to the draft under-lease already prepared, which will be produced at the time of sale, and may, in the meantime, be inspected at the office of H.; but no abstract of the vendor's title thereto shall be required, nor the lessor's title objected to or gone into." He afterwards employed the defendant's testator, an attorney, to complete the purchase, who failed to make the required search, or to investigate the vendor's title or to require the production of the original lease. It subsequently appeared that the premises had been previously mortgaged, and the plaintiff was turned out of possession by the mortgagee. Held, that this amounted to negligence on the part of the attorney sufficient to maintain an action against him.

If an attorney is employed by the lender to examine the title of real property

offered as a security for a contemplated loan by the borrower, he is responsible to the lender for the correctness of his opinion, although the expense of the examination is paid by the borrower: *Page v. Trutch*, 3 Cent. L. J. 559; 8 Chicago L. N. 385.

If an attorney employed by a vendor to settle on his part the assignment of a term, allow him to execute an unusual covenant without explaining the liability thereby incurred, he is responsible to him for his consequent loss, notwithstanding he is himself, at the time of the assignment, aware of the fact in respect to which he afterwards incurs liability on his covenant: *Stannard v. Ullithorne*, 10 Bing. 491; s. c. 3 Scott 771.

In *Taylor v. Blacklow*, 3 Bing. 235, the defendant, an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender certain defects in plaintiff's title, *per quod*, plaintiff was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted and compelled to give higher rate of interest. *Held*, that this was a breach of duty for which an action would lie against the defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff.

An attorney is liable for a failure to report a judgment by confession against property: *Gilman v. Hovey*, 26 Mo. 280.

Where the declaration stated that the plaintiff retained the defendants as attorneys in and about ascertaining the title of G. R. to certain lands and tenements, and to take due and proper care that "the same" should be a sufficient security for the repayment of a sum of 600*l.*, *Held*, that the words "the same" had reference to the title of G. R., and were not to be construed as charging the defendants upon a contract to inquire into the value of the lands, and was, therefore, supported by evidence of a retainer to investigate the title as a se-

curity for the repayment of the 600*l.*: *Hayne v. Rhodes*, 15 L. J. Q. B. 137; 10 Jar. 71.

In *Ware v. Lewis*, Irish R., 4 Eq. 419, plaintiff gave a sum of money to a firm of solicitors to invest upon freehold security. They found a security and invested the money upon it. The security turned out valueless. *Held*, that the giving of the money to the solicitors for the purpose of general investment did not of itself create the relation of trustee and *cestui que trust*, so as to make them liable as trustees.

In *Craig v. Watson*, 8 Beav. 427, a solicitor took an insufficient security for his client, and the nature of the transaction was such as in the opinion of the court created a case of combined agency and trust. He was held (under the circumstances) personally responsible for the deficiency and for the costs of the suit.

And where A. placed moneys in the hands of her solicitor, who acted also for her as a money scrivener, undertaking to find securities for her, and he placed the moneys out on insufficient securities, misrepresenting to her their character, *Held*, that as against him, if living, it would have been, and as against his estate after his death it was not, a matter for an action for negligence, but a matter of account between principal and agent, and the client had a right to reject the charge for disbursements on the insufficient securities: *Smith v. Pboocke*, 2 Drew. 197.

Where it is contended that the evidence fails to show that at the time the abstract was made the judgment and sale were of record, it was *held* that as it was the duty of the officers to promptly make the necessary records thereof, such entry would be presumed to have been made: *Chase v. Heaney*, 70 Ill. 270.

As to what is sufficient evidence of negligence, see *Ireson v. Pearman*, 3 Barn. & C. 799. See generally, *Van Schaick v. Sigel*, 60 How. Pr. 122;

affirming s. c. 58 How. Pr. 211; *Dartnall v. Howard*, 4 B. & C. 345; *Knights v. Quarles*, 4 Moore 532; *Watts v. Porter*, 3 El. & Bl. 743; *Waine v. Kempster*, 1 Fost. & F. 695; *Potts v. Dutton*, 8 Beav. 493; *O'Hanlon v. Murray, Jr. R.*, 12 C. L. 161.

A bill in equity will not lie against an attorney for damages for negligence in investigating a title: *British Mutual Investment Co. v. Cobbold*, L. R., 19 Eq. 627; *Nancrede v. Voorhis*, 32 N. J. Eq. 524. But otherwise, if he becomes a trustee to invest: *Nancrede v. Voorhis*, *supra*. In this case the attorney had promised the complainant to obtain first mortgage for her, and he was held—it being a case of mingled trust and agency—accountable for the amount of the encumbrance on the property prior to hers, but not for any subsequent depreciation in the value, caused by general business depression, the property at the time being shown to have been, apart from the prior encumbrances, abundant security.

To pass the title, there being at the time a judgment by default against the vendor, the damages on which have not been liquidated, is not evidence of a want of ordinary knowledge and skill and due caution: *Watson v. Muirhead*, 57 Penn. St. 161. And deeds recorded before the grantor has any record title may be safely disregarded in examinations of title under the system of registration and notice adopted in Missouri. They are not constructive notice to an innocent purchaser, and the examiner is not bound to look for deeds of any person through whom the title passes, before the date of his record title: *Dodd v. Williams*, 3 Mo. App. 278. See also *State v. Bradish*, 14 Mass. 296; *McCusker v. McEvoy*, 10 R. I. 610; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige 361.

In *Kimball v. Connolly*, 33 How. Pr. 247, it was held that the county clerk of the city and county of New York is not liable for damages resulting from errors, inaccuracies or mistakes in his certificates

of searches under the act of 1853, unless the loss to the party by which such damage accrued is the direct consequence of such error or mistake. Thus, where the owner of real estate, for the purpose of procuring a loan of money thereon, caused the usual written requisition to the county clerk to search for judgments against the property, to be delivered to him, who made the requisite search, and certified to its correctness in the usual manner, and thereupon the loan of money was obtained on bond and mortgage upon the premises, and subsequently it was ascertained that a certain judgment upon the property had been overlooked and not returned by the clerk, upon which judgment the premises were thereafter sold, and the owner was compelled to pay a considerable sum over and above the amount of the judgment, in order to compromise and settle the matter. *Held*, that the county clerk was not liable to the owner. His loss occurred from the non-payment of the judgment, and not from the error in the clerk's return. He obtained the loan for which he applied, and nothing was abated from it on account of this encumbrance.

An attorney having been retained by two trustees about to advance trust money upon the security of property already mortgaged, to see that the security was sufficient and that the proper deeds were executed, one of the trustees advanced moneys on the execution of the mortgage without receiving an assignment of the first mortgage. It having turned out that there was another previous mortgage, and the security proved insufficient: *Held*, that there was no evidence of negligence on the part of the attorney, although by the agreement which he had prepared, part of the money advanced was to be applied to the redemption of the prior mortgage; it not appearing that the defendant was aware of the trustee's intention to act as he did: *Brumbridge v. Massey*, 28 L. J. (N. S.) Exch. 59; 32 L. T. 108.

In *Elder v. Bogardus*, Lator's Sup. (N. Y.) 116, the declaration averred that the attorney was retained to examine the title to certain premises, and to procure an estate in fee simple therein to be conveyed to plaintiff within a reasonable time, and assigned as a breach of duty that the attorney did not procure a good and sufficient title to the fee simple within such reasonable time, but advised plaintiff to purchase without having a good unincumbered and sufficient title to the fee simple, by reason whereof plaintiff had to pay a large sum to release incumbrances. *Held*, bad on demurrer. The action appeared to be brought for not procuring an unincumbered title, while the retainer was to examine the title and to procure a conveyance in fee simple. The existence of incumbrances did not prevent the plaintiff from acquiring a title in fee. The retainer did not cover the breach: *Held*, further, that the declaration should have stated what incumbrances affected the premises. See also, *Whitehead v. Greetham*, 2 Bing. 464; 10 Moore 183.

Statute of Limitations.—The cause of action accrues at the time the examiner fails to do what he agreed to do, and not at the time when it is discovered that the certificate is untrue: *Rankin v. Schaeffer*, 4 Mo. App. 108; *Short v. McCarthy*, 3 B. & Ald. 626; *Wilcox v. Plummer*, 4 Pet. 172; *Argall v. Bryant*, 1 Sandf. 98.

The gist of the action is the negligence, and therefore the statute of limitations runs from the time of the negligence, and not from the time of the loss of interest: *Howell v. Young*, 2 Car. & P. 238; 5 B. & C. 259.

In an action upon the case, against a recorder of deeds, for damages suffered by reason of a false certificate of search given by a recorder to the plaintiff, in the absence of fraud the statute of limitations begins to run from the time when the search was given, and not from the development of the damage, and it is immaterial that the party who received and paid for the search had no knowledge of its falsity or cause for inquiry until more than six years after it was given. The cause of action, within the meaning of the statute of limitations, was the issuing of the false certificate. The right of action accrued to the plaintiff as soon as it parted with its money on the faith of it, and from that period the statute began to run: *Owen v. Western Saving Fund*, 97 Penn. St. 47.

See, generally, as to the liability of attorneys for advice as to titles, Weeks on Attorneys 520; Warvell on Abstracts 555-565; Wharton on Neg. 751, note; Shea. & Redf. on Neg. §§ 232, 233; Addison on Contracts 8th ed. 593; Addison on Torts (Dudley & Baylies's ed.) 499.

CHARLES L. BILLINGS.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹COURT OF ERRORS AND APPEALS OF MARYLAND.²SUPREME JUDICIAL COURT OF MASSACHUSETTS.³SUPREME COURT OF MISSOURI.⁴SUPREME COURT COMMISSION OF OHIO.⁵

ACCOUNT.

Account Stated—For what Opened.—After the completion of a building the owner and the builder had an accounting and settlement, and the owner, without making any claim for damages caused by delay in the prosecution of the work, gave his note for the balance found to be due. *Held*, that in the absence of fraud in procuring the settlement, mistake in making it, or ignorance of his rights when it was made, the owner could not defend against the note on the ground that there had been such delay resulting in damages to him: *Pickel v. St. Louis Chamber of Commerce Association*, 80 Mo.

ACTION. See *Officer*.

Breach of Contract—Composition with Creditors.—T. made a contract with H. for the purchase of a large number of shooks, to be delivered and paid for in different quantities and at specified intervals between the 1st day of October 1875, and the last day of February 1877. On the 26th of April 1876, T. wrote to H. not to send him any more shooks. *Held*, that this action amounted to a repudiation of the contract, and it entitled the seller to consider it entirely at an end: *Textor v. Hutchins*, 62 Md.

Whether it entitled the injured party to an immediate action to recover damages in respect to each and every future delivery stipulated in the contract, *Quære: Id.*

On the 9th of June 1876, T. made a composition with certain of his creditors, including H., by which he agreed to pay in cash, to every creditor accepting the agreement, one-fourth of his claim, and to deliver to him two endorsed notes, each for one other fourth; it being stipulated that said cash and notes should be accepted by the creditors in full satisfaction of their respective claims. The claim of H., as stated by him, was duly settled according to the terms of the composition, and did not include any damages for the breach of the contract for the shooks. In an action subsequently brought by H. against T. to recover said damages, it was *held* that the action was barred by the composition proceedings: *Id.*

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 112 U. S. Rep.

² From J. Schaaff Stockett, Esq., Reporter; to appear in 62 Md. Rep.

³ From John Lathrop, Esq., Reporter; to appear in 137 Mass. Rep.

⁴ From T. K. Skinker, Esq., Reporter; to appear in 80 Mo. Rep.

⁵ From E. L. De Witt, Esq., Reporter. The cases will probably appear in 41 or 42 Ohio St. Rep.

Conspiracy—Obtaining Judgment in other State.—No action lies by A. against B. for conspiracy between B. and C. in obtaining a judgment against A. in an action brought in a court of another state having jurisdiction of the subject-matter and of the parties, in which A. appeared and answered, but was defaulted, which judgment remains in full force, and to satisfy which A.'s property in that state was sold: *Engstrom v. Sherburn*, 137 Mass.

ADMIRALTY.

Charter-Party—Stipulation as to Sailing.—The words of the charter-party were "now sailed, or about to sail, from Benizof, with cargo, for Philadelphia." *Held*, to require that the vessel was already loaded, whether she had "sailed" or was only "about to sail:" *The Wickham*, S. C. U. S., Oct. Term, 1884.

AGENT. See *Evidence*.

ASSIGNMENT.

Tort—Assignment of Cause of Action.—A cause of action against a railroad company arising under the forty-third section of the Railroad Law, for double damages for the killing of live stock, cannot be assigned so as to invest the assignee with the right to sue: *Snyder v. Wabash, St. L. & Pac. Ry. Co.*, 80 Mo.

BAILMENT.

Storage—Property subject to Mortgage—Liability of Mortgagee.—If a mortgagor in possession of personal property removes and stores it with a third person, who has no actual notice of the mortgage, which is recorded, the mortgagee, who afterwards is informed of the removal and storing, and expresses no disapproval of the same, is not liable to such person for the charges for storage, although the storage is necessary for the preservation of the property, but may maintain an action against him for its conversion: *Storms v. Smith*, 137 Mass.

BANK.

Collateral Security for Note—Lien for General Balance.—A savings bank has no lien upon the surplus proceeds of the sale of stock, held as collateral security for the payment of a promissory note, for the general balance due from the maker of the note: *Brown v. New Bedford Inst.*, 137 Mass.

BILLS AND NOTES.

Alteration—Agreement.—A material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note as to the maker, although the change was made some time after the agreement and without knowledge on the part of the maker that the agreement had been made effective by the actual alteration of the note: *Wardlow v. List*, 41 or 42 Ohio St.

COMMON CARRIER.

Railroad—Excursion Ticket.—Expulsion of Passenger.—The appellant purchased of an agent of the appellee at a reduced rate of fare an excursion ticket, to be used, between the stations designated, within three days, including the day of sale. He made the journey in one

direction, and after the expiration of the time limited, he attempted to return on the ticket, which the conductor declined to receive for his passage, and upon his refusal to pay the fare demanded, he was expelled from the train. In an action against the railroad company to recover damages for such expulsion, it was *held* that the plaintiff's rights were limited by the ticket, and he was rightly required to leave the train upon refusing to pay the fare demanded; and after being expelled he had no right to be readmitted except upon payment of full fare for the whole distance: *Pennington v. Phila., Wil. and Balt. Rd. Co.*, 62 Md.

CONFLICT OF LAWS. See *Corporation*.

CONSPIRACY. See *Action*.

CONSTITUTIONAL LAW. See *International Law*.

Regulation of Commerce—Duty of fifty cents for each Foreign Passenger.—The Act of Congress of August 3d, 1882, "to regulate immigration," which imposes upon the owners of steam or sailing vessels who shall bring passengers from a foreign port into a port of the United States a duty of fifty cents for every such passenger not a citizen of this country, is a valid exercise of the power to regulate commerce with foreign nations: *Head Money Cases*, S. C. U. S., Oct. Term, 1884.

Though the previous cases in this court on that subject related to state statutes only, they held those statutes void on the ground that authority to enact them was vested exclusively in Congress by the constitution, and necessarily decided that when Congress did pass such a statute, which it has done in this case, it would be valid: *Id.*

The contribution levied on the shipowner by this statute is designed to mitigate the evils incident to immigration from abroad by raising a fund for that purpose, and it is not, in the sense of the constitution, a tax subject to the limitations imposed by that instrument on the general taxing power of Congress: *Id.*

CORPORATION.

Mortgage of Charter—Exemption from Taxation.—An act incorporating a railroad company authorized a mortgage of its "charter and works" and exempted it from certain taxation. After a foreclosure sale under such a mortgage and a reorganization of the company, *Held*, that the franchises embraced in the mortgage were limited to those which had been granted as appropriate to the construction, maintenance, operation and use of the railroad as a public highway and the right to make profit therefrom; that the exemption from taxation did not extend to the reorganized corporation, and that the right of the purchasers at a sale under the mortgage to organize as a corporation, even if it had been conferred in express terms in the charter, would be a right to so organize according to such laws as might be in force at the time of the actual organization, and subject to such limitations as they might impose: *Memphis Railroad Co. v. Commissioners*, S. C. U. S., Oct. Term, 1884.

Foreign Corporation—Suit by—Receiver—Dissolution.—A fire insurance company incorporated under the laws of Pennsylvania is entitled to bring an action in a Maryland court, for the use of the receiver of such company, to recover from a Maryland policy holder assessments

on his premium note where the suit is not brought by such receiver in his official capacity: *Lycoming Fire Ins. Co. v. Langley*, 62 Md.

Although it is settled law that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, yet it may transact business in all places where its charter allows and local laws do not forbid; and in the absence of such prohibition by local laws, may institute suits in the courts of states other than those under whose laws it has been established: *Id.*

By the decree of a court in Pennsylvania a receiver was appointed for a fire insurance company created under the laws of that state. The decree also declared the company to be dissolved, but at the same time referred to the act of assembly under which it was passed. That act provided that when an insurance corporation is dissolved the court appointing such dissolution may appoint a receiver to take charge of its assets and collect the debts and property due and belonging to it, "with power to prosecute and defend suits in the name of the corporation, or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement of the unfinished business of the corporation." In an action in Maryland brought in the name of the corporation for the use of the receiver, it was held that the decree of dissolution was no bar to the action: *Id.*

DAMAGES. See *Equity*.

EQUITY.

Jurisdiction—Trespass—Damages.—A court of equity has no inherent power to ascertain the amount of damages by reason of tortious acts attended by profits to the wrongdoer. There must be some joint interest, or interest in common of the parties in the property for a court of equity to assess the damages: *Atlantic, &c., Coal Co. v. Maryland Coal Co.*, 62 Md.

In a case of trespass where no such relations exist, there is no ground on which a court of equity can set up any other rule of damages than that which prevails at law: *Id.*

The right to maintain the action of *quare clausum fregit* exists in this case, whether the defendant committed the trespass unwittingly, or wilfully and wantonly: *Id.*

The owner of adjoining property is held to know the boundaries between him and his neighbor. If he has made a mistake *bona fide* as to his title or boundaries, in mining coal, the lowest measure of damages applicable is the value of the coal immediately upon its conversion into fuel, without abatement of the cost of severance: *Id.*

If the trespass has been committed through negligence or design, punitive damages in addition may be recovered: *Id.*

An unwitting trespasser, merely as such, could not change the amount of his liability by simply changing the forum. No lower measure of damages for trespasses not negligent nor wilful could be substituted in equity for that fixed at law on general principles for such trespasses: *Id.*

ERRORS AND APPEALS.

The Opinion not a part of the Record.—Rule 8, sect. 2, of the Federal Court of the United States requiring a copy of any opinion

that is filed in a cause to be annexed to and transmitted with the record on a writ of error or appeal, does not make the opinion a part of the record : *Enoland v. Gebhardt*, S. C. U. S., Oct. Term, 1884.

ESTOPPEL.

Consent to building of Wall—Mistake of Fact.—If A. is informed by B., who owns land adjoining that of A., that B. proposes to erect a wall on his own land at his own expense, and A. assents that the wall shall be built according to the line of B.'s land as established by the survey of C., A. is not estopped to maintain a writ of entry against B., after the wall has been built, for land erroneously included in such survey if, in assenting to the building of the wall, he acted under a mistake of fact, and not with intent to mislead B. : *Proctor v. Putnam Mach. Co.* 137 Mass.

EVIDENCE.

Agent's Declarations and Verbal Acts.—The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railway company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage, *Held*, that they were not binding on the company : *City of Chillicothe v. Raynard*, 80 Mo.

EXECUTORS AND ADMINISTRATORS.

Executor as Trustee.—The fact that the same person is both trustee and executor under the will, will not operate to enlarge, transpose or transfer the powers from one capacity to the other, but the powers assigned to each capacity must be executed by the party in the capacity to which the powers are assigned : *Long v. Long*, 62 Md.

HUSBAND AND WIFE.

Disappearance of Husband—Presumption of Death—Partition—Payment of Share to Administrator—Presumption of Payment to Wife for her Support.—In 1864, Henry First, then a resident of Knox county, Ohio, absconded, deserting his wife and four children, and nothing was ever heard of him in that community until he reappeared in 1880. In 1873 land in said county belonging to him, in common with others, was partitioned at suit of co-tenants, and his share of the proceeds came to the custody of Brent, the clerk of the Common Pleas. In 1879, with his wife's assent, the probate court appointed Bennett administrator of W. H. First, supposing that to be the true name of the absentee, and he collected from Brent \$174.21, the said proceeds of said partition. In October 1880, First demanded said sum from Brent, and on his refusal to pay, brought suit. *Held* : 1. In the absence of a showing to the contrary, the presumption, from the facts stated, is that the money was paid to the wife, who was entitled to a year's support, on the supposition that her husband was dead. 2. As she was entitled to support out of his property during his life, First's conduct estops him from claiming that the payment to her was unauthorized : *Brent v. First*, 41 or 42 Ohio St.

INFANT.

Prochein Ami—Attorney—Appeal—Costs.—An infant brought by her *prochein ami*, in a court of law. Afterwards she employed an attorney and requested him to dismiss the suit, which was accordingly done. A motion was subsequently made in the name of the infant by her *prochein ami*, asking the court to strike out the entry of "off," which had been made in the case, and reinstate it on the docket for trial. On appeal from the order of the court overruling this motion, it was held: 1. That the infant, until she reached the age of twenty-one years, was incompetent to appoint an attorney or to take any step in the suit which would bind her rights. 2. That the appointment of an attorney by her *prochein ami*, his dismissal of the suit was simply void. 3. That the order below was therefore in error in refusing to reinstate the case, and that an appeal could be taken from such refusal. 5. That it was within the power of the infant, after attaining the age of twenty-one years, to ratify and approve the act of her attorney. Where an infant is represented by *prochein ami*, the latter is the only person who is authorized to prosecute the suit, and is responsible for the costs. While it is competent for the court, after the infant has arrived at the age of twenty-one years, to discharge the *prochein ami*, and give the infant control over the suit, it must make such equitable order as will protect the *prochein ami* from costs already incurred and relieve her from liability in the case: *Wainwright v. Wilkinson*, 62 Md.

INTERNATIONAL LAW.

Enforcement of Treaty—Effect of Act of Congress upon same.—A treaty is primarily a compact between independent nations, and depends for its enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial courts have nothing to do: *Head Money Cases*, S. C. U. S., Oct. Term, 1884.

A treaty may also confer private rights on citizens or subjects of the contracting powers which are of a nature to be enforced in a court of justice, and which furnishes a rule of decision in such cases. The Constitution of the United States makes the treaty, while in force, a part of the supreme law of the land in all courts where such rights are involved: *Id.*

As to this respect, so far as the provisions of a treaty can become the subject of judicial cognisance in the courts of the country, they are subject to such acts as Congress may pass for their enforcement, modification or repeal: *Id.*

JUDGMENT. See *Action*.

LIMITATIONS, STATUTE OF.

Foreign Cause of Action.—Whether a suit brought in one state on a cause of action originating in another state is barred by limitation, is to be determined by the law of the state where the suit is brought: *Stirling v. Winter*, 80 Mo.

MORTGAGE. See *Bailment*.

Collateral Security—Renewal of Debt without consent of Mortgagor.

—A married woman mortgaged her property to secure the note of her husband given for the purpose of raising money to pay the debt of a lumber company, of which he was president. The money was raised by a loan from an insurance company, on the note of the lumber company, at one year, with the mortgage as collateral thereto, and the insurance company had knowledge that the mortgaged property was designed by the mortgagor to serve as surety for the payment of the loan. Without the mortgagor's knowledge or consent, the note of the lumber company, at the end of the year, was renewed, and soon thereafter surrendered, cancelled and marked "paid" upon the books of the insurance company, and a new note, with other and different parties, was substituted in its place, and twice renewed, and then extended, the mortgage being at the while held as collateral. *Held*, that the mortgage was released. *People's Ins. Co. v. McDonnell*, 41 or 42 Ohio St.

MUNICIPAL CORPORATION. See *Negligence*.

Negligence—Fireworks—Injury to Spectator.—A city which undertakes the celebration of a holiday, under the authority of the Pub. Stat. c. 28, § 13 (which provides that the city council may appropriate money for such a purpose), exclusively for the gratuitous amusement of the public, is not liable to an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks for the purposes of the celebration: *Tindley v. City of Salem*, 137 Mass.

NEGLECT. See *Municipal Corporation*.

Independent Contractor—Supervision of Owner.—A contractor entered into a written contract with the trustees of an estate, by which he agreed "to take down the entire building known as the A. house, belonging to said trustees, or so much thereof as the trustees may request;" and which also provided as follows: "All of said work to be done carefully and under the direction and subject to the approval of the trustees." *Held*, that the trustees were liable for injuries occasioned to a third person by the negligence of the contractor, or of his servants, in doing the work named in the contract: *Linnahan v. Rollins*, 137 Mass.

Independent Contractor—Supervision of Work—Municipal Corporation.—Where a city contracted for the construction of a cistern eighteen feet wide and twenty feet deep, in a street, and before the cistern was completed a horse fell into it and was killed for want of sufficient protection around and over the excavation to guard animals in the proper use of the street from danger. *Held*, that the city was liable for the loss of the horse, although it did not reserve or exercise any control or direction over the manner of doing the work, except to see that it was done according to specifications which were a part of the contract: *City of Circleville v. Nending*, 41 or 42 Ohio St.

Contributory Negligence—Crossing Track—Presumption that Company is obeying Ordinance.—When a city council, by ordinance, prohibited the running of railroad trains through its limits at a rate of speed greater than that named in the ordinance, a traveller upon a street, in such city crossing the track of a railroad, has a right to presume that the company will conform to such regulation. If he acts in accordance with such presumption, in the absence of knowledge of the fact that the rail-

and company is exceeding such limit in running a train, it will not of itself be an act of negligence: *Meek v. Penn. Co.*, 38 Ohio St. 632, followed and approved. The trial judge did not err in substantially directing the jury to take into consideration all the objects and things at the crossing of the railroad and street, and to consider what was done by the deceased under all these circumstances, and in saying that if they found that his action was that of a person of ordinary prudence, they must also find that he was not guilty of contributory negligence: *Hart v. Devereux*, 41 or 42 Ohio St.

Contributory Negligence—Independent Contractor—Negligence of Owner—Partnership—Where there is evidence tending to prove negligence on the part of the defendant, and also evidence from which the proper inference to be drawn as to fault on the plaintiff's part is doubtful, it should be submitted to the jury to determine whether the plaintiff was injured by his own fault or that of the defendant.: *Kelly v. Russell*, 41 or 42 Ohio St.

A contractor agreed with the owner of a mine to do certain work therein, the owner engaging to furnish and put up such props or supports for the roof of the mine as would render the miners secure, whenever notified by the contractor that the same were necessary. *Held*, that although such notice from the contractor may not have been received by the owner, the owner, if he had actual knowledge that such supports were necessary, was liable in damages to an employee of the contractor, who, without negligence on his own part, had been injured while at work in the mine, through the want of such supports for the roof. If the overseer of the mine acted in behalf of a partnership of which he was a member, and the mine, at the time of the injury of the employee, was in the occupation of the firm, and the work was being done therein for the firm's use and benefit, the partnership will be liable for the neglect to furnish and put up the supports necessary for the safety of the contractor's employees: *Id.*

OFFICER.

Public Porter—Action on his Bond.—A person whose baggage has been lost through the negligence of a public porter licensed by the city, may maintain an action on a bond given by him to the city pursuant to charter and ordinance, for the faithful performance of the requirements of the ordinance and the safe delivery of all articles entrusted to his care: *City of Chillicothe v. Raynard*, 80 Mo.

PARTNERSHIP. See Negligence.

POSSESSION.

Estates for Life and in Remainder—Adverse Possession.—The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations: *Keith v. Keith*, 80 Mo.

Acceptance of a deed from the true owner granting a life estate to the grantor, with remainder over, waives any rights the latter may have acquired by a former adverse possession, and precludes him and those

claiming under him from asserting that his subsequent possession is adverse as against the remainderman: *Id.*

PRACTICE.

Trial by Court without Jury—Review of Questions of Law—Waiver of Jury.—In an action at law, submitted to the decision of the circuit court, waiving a trial by jury, in which the record does not show the filing of the stipulation in writing required by section 649 of the Revised Statutes, this court, upon bill of exceptions and writ of error, cannot review rulings upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, but may determine whether the declaration is sufficient to support the judgment: *Bond v. Dustin*, S. C. U. S., Oct. Term, 1884.

The filing of a stipulation in writing, waiving a jury, under section 649 of the Revised Statutes, is not sufficiently shown by a statement in the record or in the bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial by agreement of parties, by the court, without the intervention of a jury:" *Id.*

PRESUMPTION. See *Husband and Wife*.

RAILROAD. See *Common Carrier; Negligence*.

REMOVAL OF CAUSES.

Suit on Administrator's Bond.—Where the bond of an administrator is by law taken to the state, but is held for the security of persons interested in the estate of the deceased, a suit thereon, so far as the jurisdiction of the United States Circuit Court is concerned, must be treated as though the person for whose use the suit is brought was alone named as plaintiff: *Maryland v. Baldwin*, S. C. U. S., Oct. Term, 1884.

REPLEVIN. See *Tax*.

SET-OFF.

Setting off Joint Judgment against Separate Note.—The maker of a separate note in suit who holds an overdue joint note made by the plaintiff and another who are both insolvent, may, in equity, set off the joint demand. The holder of a promissory note who took it after maturity holds it subject to every objection, including equitable set-off, to which it was subject in the hands of his assignor. The merger of a debt into judgment is not so perfect in equity as to preclude the judgment-creditor from resorting to the original demand and the relations of the parties to it, for the purpose of enabling him to disclose and assert an equitable set-off: *Baker v. Kinsey*, 41 or 42 Ohio St.

SUBROGATION.

Deed of Trust—Satisfaction by Stranger.—Where a land owner, to save his land, pays a note secured by a deed of trust executed by a former owner, upon which he is not legally liable, the debt is not thereby extinguished; he is subrogated to the rights of the holder as against the maker: *Allen v. Dermott*, 80 Mo.

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VALIDITY OF CONTRACTS IN RESTRAINT OF
TRADE.

ORIGIN AND HISTORY.

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- (b) *Growth of Opinion.*
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 - 2. *Rule in the beginning of the Seventeenth Century.*
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VII. PARTIAL RESTRAINTS.

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- (d) *Application of the Rule.*
- (e) *Presumptions.*
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ORDINARILY, persons who are competent to contract are permitted to determine for themselves what obligations they will assume. It is only to prevent injury to the public, that the law interferes with this freedom of contract. The promotion of the public welfare is the first consideration of the law. It is the duty of all courts of justice to keep their eye steadily upon the public interest, even in the administration of commutative justice. Therefore, any action founded upon a contract, although not expressly prohibited by positive law, which in its operation would injure the public, or which contravenes any established interests of society, or conflicts

the morals of the times, cannot be maintained. Thus, one cannot by contract bargain away his life (Wharton's Criminal Law, (8th ed.) sec. 145; 1 Wharton on Cont., sec. 430), restrain his right to liberty,¹ or destroy or materially impair his industrial usefulness: *Dakin v. Williams*, 11 Wend. 67; *Whitney v. Slaton*, Me. 224. Likewise, one cannot, for any consideration whatever, make a binding contract to abandon his customary calling or never to engage in it again anywhere. Such a contract operates as a restriction upon the freedom of trade. Restraints of this nature will be considered in this article.

ORIGIN AND HISTORY.—The law of these contracts, as it exists to-day, originated in England. It is said to have sprung from the English law of apprenticeship: 2 Parsons on Cont. (7th ed.) p. 751. This doctrine was also a principle of the Roman law (ff. lib. 5, c. 2, sects. 3, 21, H. VII. 20, cited in *Mitchel v. Reynolds*, 1 Smith's Lead. Cas. 709; s. c. 1 P. Wms. 181) (11); but whether it is recognised in the jurisprudence of any other country, we are unable to state; yet it is certain that no such principle prevails in France: *Roussillon v. Roussillon*, L. R., 14 Div. 351; s. c. 19 Am. Law. Reg. 748, and note. Originally the apprenticeship law of England was unreasonably oppressive. At no one could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company was required. For one to relinquish a trade or mystery, therefore, "was to throw himself out of employment; to fall as a burden upon the community; to become a pauper:" 2 Parsons on Cont. (7th ed.) p. 751. Hence it can easily be perceived why the earlier judges "frowned with great severity on such contracts."

a) Early English Cases.—The first reported case on this subject arose during the reign of Henry V. (1415), more than four centuries ago. Here a dyer bound himself not to exercise his trade for half a year, and in an action for its enforcement, Judge HULL, as soon as he heard the bond read, flew into a passion, swore upon

¹ "What consideration can a man have received adequate to imprisonment at labor for life? It is going but one step further to make an agreement to be bound. I presume no one would be hardy enough to ask the court to enforce such an agreement; yet the principle is, in both cases, the same:" per TILGHMAN, J., in *Mitchel v. Commonwealth*, 14 S. & R. (Penn.) 69; Whart. on Crim. Pl. & Pr., 351.

the bench, and expressing himself with more fervor than decency declared in bad French, that if the plaintiff were in court he should go to prison until he had paid a fine to the king: "*Per Dieu, si le plaintiff fut icy, il irra al prison tang il ut fait fine al Roy*". By God, if the plaintiff were in court he should go to prison till he had paid a fine to the king;—Year Book, 2 Henry V., fol. 5, pl. 26, cited in *Mitchel v. Reynolds*, 1 P. Wms. 181; *Lange v. Werk*, 2 Ohio St. 526, 527; *Beard v. Dennis*, 6 Ind. 202. And as late as the eighteenth century (1711), Chief Justice PARKER, in referring to this judge's great displeasure, said that he could not "but approve the indignation that judge expressed, though not his manner of expressing it:" *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711).

The next case in point of time is *Colgate v. Bacher*, Cro. Eliz. 872, Owen 143, where one bound himself to abstain from the use of his trade of haberdasher, for a certain time. ANDERSON, J., affecting much surprise that one should be so foolish as to give such a bond, put the absurdity of the undertaking thus: "I might as well bind myself not to go to church."

(b) *Growth of Opinion.*

1. *First Relaxation of the Old Rule.*—Hence, the old rule was that all contracts in restraint of trade, however limited in their operation, were void. But as English civilization advanced, commerce extended, the avenues of trade and employment multiplied, competition increased, the severity of the apprenticeship law abated, thus the reasons for the stringency of the old rule had in a large measure disappeared, and that fact very soon received judicial recognition. The first innovation on the old rule was made in *Rogers v. Parry*, 2 Bulstr. 136, where it was expressly declared that one may well bind himself to abandon his trade "for a certain time and in a certain place."

2. *Rule in the beginning of the Seventeenth Century.*—This modification was very soon adopted in other cases. As early as the year 1621 the principle is thus announced: "Upon a valuable consideration one may restrain himself that he will not use his trade in such a *particular place*; for he who gives that consideration expects the benefit of his customers; and it is usual, here in London, for one to let his shop and wares to his servant, when he is out of apprenticeship, as also to covenant that he shall not use that trade in such a shop or in such a street; so, for a valuable consideration, and voluntarily, one may agree that he will not

se his trade for *volenti non fit injuria*:" *Broad v. Jollyfe*, Cro. ac. 596. See, in this connection, *Jellist v. Broad*, Noy 98; *Crugnell v. Gosse*, Aleyn 67; *Clerk v. Tailors of Exeter*, 8 Ev. 241.

3. *The Modern Rule*.—From time to time, as the social condition changed, a more liberal view has been applied to these kinds of contracts. And it is not because they are any more legal and enforceable at this time than they were in the days of Henry V., but because the courts look differently at the question as to what is restraint of trade: *Presbury v. Fisher*, 18 Mo. 50; *Long v. Lowl*, 42 Id. 545; *Shrainka v. Scharringhausen*, 8 Mo. App. 25. The leading case of *Mitchel v. Reynolds*, 1 P. Wms. 81; s. c. 1 Smith's Lead. Cas. 705, contains a very thorough exposition of the whole subject, and has been substantially followed in most all subsequent cases. (See, also, Parsons on Cont. (5th ed.) 751; 2 Addison on Cont. (1883), B. V. Abbott's notes, bottom page 737; 2 Wharton on Cont., sect. 430; Smith on Cont. (5th ed.) 180; 2 Chitty on Cont. 982; *Davis v. Mason*, 5 T. R. 118; *Bun v. Guy*, 4 East 190; *Gale v. Reed*, 8 A. 80; *Hayward v. Young*, 2 Chitty 407; *Bryson v. Whitehead*, 1 Simmons & S. 74; *Homer v. Ashford*, 3 Bing. 322; *Chappel v. Brockway*, 21 Wend. 157). In *Mitchel v. Reynolds*, it was decided that a bond conditioned not to exercise a certain trade "within a particular parish" was good; but, observed Chief Justice PARKER, who delivered the opinion, "where it is given not to exercise a trade throughout the kingdom, it is bad." This last remark has not escaped criticism. CHRISTIANCY, J., of the Supreme Court of Michigan, in an elaborate opinion, clearly shows that the observation of the learned English judge is not always infallible; that there may have been much reason for making such a declaration more than a century and a half ago, but he seriously questions whether such a principle was ever applicable to our condition: *Beal v. Chase*, 31 Mich. 519, 20. Judge HOWE, of the Supreme Court of Wisconsin, has also taken the same advanced ground: *Kellogg v. Larkin*, 3 Pinney (Wis.) 123; s. c. 3 Chandler (Wis.) 133. And Judge COOLEY has expressed himself likewise: Article in Am. Ry. Age, April 26th 1884, on "The Popular and Legal View of Railway Pools." But whatever different views may prevail as to the propriety of allowing these contracts, the general rule, as deduced from the cases, is that

all contracts in restraint of trade whose operation is general, and unenforceable (see authorities, *supra*, and also *Thomas v. Miles Adm.*, 3 Ohio St. 274 (1854); *Hedge v. Lowe*, 47 Iowa 137 (1877); *Lange v. Werk*, 2 Ohio St. 519 (1853); *Mossop v. Mason*, 18 G. Ch. (Ont.) 453 (1871); s. c. 17 Id. 360 (1870); s. c. 16 Id. 30 (1869); *Kennedy v. Lee*, 3 Mer. 440-452 (1817); *Caswell v. Gibbs*, 33 Mich. 331 (1876); *Gale v. Reed*, 8 East 80 (1806); *Hinde v. Gray*, 1 M. & G. 195 (1840); s. c. 1 Scott N. R. 123; *Peltz v. Eichele*, 62 Mo. 171 (1876); *Saratoga Co. Bk. v. King*, 44 N. Y. 87; *Curtis v. Gokey*, 68 Id. 300 (1877); s. c. 5 Hu. 555 (1875); *Pierce v. Fuller*, 8 Mass. 223; s. c. 5 Am. Dec. 102); but to this general rule there are a few exceptions which will be hereafter noticed.

II. FOUNDATION OF THE DOCTRINE.—The reasons of the rule may well be inferred from what has already been said. Public policy is its corner-stone. The public demands that there shall be no restraints upon industry. The industrial maxim, that "competition is the life of trade" is the foundation of the doctrine; "therefore," say those who believe implicitly in the maxim, "whatever destroys or even relaxes competition is injurious if not fatal to it." "The general principles which govern contracts in restraint of trade," said the Supreme Court of California: in *Wright v. Ryder*, 36 Cal. 342, 357 (1868), "are well settled both in England and the United States. They proceed upon the theory that the public welfare demands that private citizens should not be allowed even by their own voluntary contracts, to restrain themselves unreasonably from the prosecutions of trades, callings, or professions, or from embarking in business enterprises, in the promotion and encouragement of which the public has an interest." The Supreme Court of the United States, in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 67 (1873), per BRADLEY, J., states the reasons of the rule as follows: "There are two principal grounds upon which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public of being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and family. It is evident that both of these evils occur, when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire

realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy."

The individual as well as the public would suffer injury by the enforcement of such contracts. The loss to society of a valuable member is a great public injury. The capacity of an individual to produce, constitutes his value to the public. That branch of industry in which he has been educated and to which he has devoted his energies, is supposed to be the one in which he can render the greatest profit, both to himself and the public. The fruits of his labors belong immediately to himself, but mediately to the public, and go to swell the aggregate of national wealth. "Therefore," as Judge HOWE once remarked (*Kellogg v. Larkin*, 3 Pinney, (Wis.) 24, 150): "the law says to each and every tradesman, you shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most, and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if a man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect, you are held discharged from such bargain, because of the advantages that will arise to the public from so holding." "Competition in trade," remarked the Supreme Court of New Jersey, "is encouraged by the law, and to allow any one to use means established and intended for the public good to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted." *Messenger v. The Pennsylvania Rd. Co.*, 3 N. J. Law (8 Vroom) 1 (1874).

BACON declared that such a contract was "against the public good, deprived the party of his means of livelihood, enabled masters to lay hardships upon their servants and apprentices; and tends to oppression." 2 Bacon's Abridg., p. 299.

CHAPMAN, J., of the Massachusetts Supreme Court, said: "The law has always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by a grant from the sovereign to a particular individual the sole right to exercise a particular trade. The mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in *Magna Charta*. * * * *

Another method by which these monopolies were sought to be obtained, was by private contracts, in which one of the parties agreed not to engage in some specified trade or business. *Taylor v. Blanchard*, 13 Allen 370 (1866).

Judge MORTON, in the leading American case of *Alger v. Thacher*, 19 Pick. (Mass.) 50, s. c. 81 Am. Dec. 119, with note, in an exhaustive and thoroughly considered opinion, states the reason of the rule as follows: "1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities, of which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly." This case is followed in 36 Cal. 342; 54 N. H. 519; 42 Mo. 549; 40 Me. 230. Chief Justice PARKER, in the great case of *Mitchell v. Reynolds*, says, "the contracts work mischief," 1st, to the party by the loss of his livelihood, and the subsistence of his family; and 2d, to the public, by depriving it of a useful member. "Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as, likewise, from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves." 3d. "Because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England,—for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." 1 P. Wms. 181 (1711). In commenting upon the first reason assigned by PARKER, C. J., in holding these contracts void, Judge HOWE, in *Kellogg v. Larkin*, 3 Pinney 139, observed: "The opportunities for employment are so abundant (in this country), and the demand for labor on all sides so pressing

and urgent, and the supply so limited, that I much question, were we to consider the question as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family by an agreement which merely excludes him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural and commercial industry open to him. And, while we have no privileged classes here, but little individual and less associated capital, and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting, and so remunerative, giving to labor the greatest freedom from competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantage in trade, or to reduce it to few hands. While so much remains to be done that all hands can do, I question if the better way to foster individual effort be not to secure it the greatest possible freedom, either to direct it to any particular calling or to abandon that calling to another for an equivalent."

And, in referring to the 3d reason of PARKER, C. J., Judge HOWE continues: "I apprehend it would be thought a dangerous precedent were the court to annul any other voluntary bond for which a voluntary consideration had been received, upon the ground that it was of no use to the obligee. * * And certainly I do not understand why that should be called a certain loss on one side, when, for what the party has abandoned, he has received an ample equivalent. If the loss is supposed to arise from a total want of consideration, or from its inadequacy, these are distinct grounds of interference." *Kellogg v. Larkin*, 3 Pinney 124.

III. INTERESTS OF THE PARTIES.—Thus far it will be seen, that the interests of the parties have been considered in determining the validity of these contracts. But whether their interests should be taken into account, there is a contrariety of opinion.

(a) *Affirmative View*.—Judge MORTON, in the leading case of *Alger v. Thatcher*, 19 Pick. 51, declared that such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families; they tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose such person to imposition and oppression." Lord MACCLESFIELD spoke

of them as working mischief "to the party by the loss of his livelihood and the subsistence of his family." *Mitchell v. Reynolds*, 1 P. Wms. 181. BACON denounced them, because they "deprived the party of his means of livelihood, enabled masters to lay hardship upon their servants and apprentices, and tended to oppression." 2 Bac. Abr. 299.

(b) *Negative View*.—But CHAPMAN, J., of the Massachusetts Supreme Court, asserts that the law "protects trade for the sake of the public, and not for the sake of the parties engaged in it." *Taylor v. Blanchard*, 13 Allen (Mass.) 370 (1866). And SELDEN, J., of the Supreme Court of New York, regards the idea of considering the interests of the parties as absurd. "The principles of public policy," says he, "which lie at the foundation of this rule, would seem to be too obvious, and yet we find it urged in many of the cases as an objection to the contract, that it tended to deprive the person bound of the means of obtaining a livelihood, as though the personal interest of the contracting party had something to do with the doctrine. * * * It is clear that the validity of the contract does not depend, in the slightest degree, upon the question whether it is beneficial or otherwise to the party bound. The interests of the public alone were considered in the adoption of the rule." He says the rule is founded upon the importance of the freedom of every citizen to engage himself "in that department of labor in which his personal efforts will be likely to add most to the aggregate productions of the country," and upon the requirement of public convenience—"that all the various trades and employments of society should be pursued each in its due proportion, a result with which the exclusion of any individual from his accustomed pursuits has a tendency to interfere." *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641 (1851). This may be considered a leading case.

(c) *Injury to the Party works Mischief to the Public*.—But whichever of the above views we adopt, it is clear that a contract which is detrimental to the interests of the parties, as above indicated, is also detrimental to the interests of the public. For if any individual, by contracts, disposes of his means of subsistence and that of his family, society feels the consequences. He and his family become subjects of public charity, and the public is deprived of the fruits of his labor. The policy of the courts is to give as much freedom as possible to the individual. "Let men make their

own bargains," is the doctrine. It is not often that men wilfully and deliberately enter into contracts prejudicial to their own interests. And, when they do, courts never interpose solely for the interests of the parties directly concerned, but because of the injury to the state. These contracts take the party from his trade, thus depriving himself and the public of the skill which he has acquired in his business; and we should remember that as large a number of skilled men as possible is a desirable element in a country which strives for commercial supremacy. Therefore, it is clear, that when Judge BRADLEY assigned as one of the reasons why these contracts should not be sustained, that "the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and family," he means that the parties by bringing mischief upon themselves, affect the public injuriously, and this is the reason why such contracts are against public policy.

(d) *When Interests of the Parties considered.*—On the other hand, we shall hereafter see that the interests of the parties are not always wholly disregarded, although subservient to that of the public. Thus contracts contemplating the same restraint may be valid or invalid, according to the circumstance which induced the parties to enter into them, and merely because the interests of the covenantees required them. But here, as in all contracts of this nature, the public welfare is first considered, and if it is not involved, and the interests of either party will be better promoted by them, the agreements will be enforced; whereas, if their interests do not demand them, the courts will declare the contract void. *Whittaker v. Howe*, 3 Beav. 383, 394 (1841); *Beal v. Chase*, 31 Mich. 490 (1875); *Roussillon v. Roussillon*, L. R. Ch. Div. 351 (1879); s. c. 9 L. J. Ch. (N. S.) 339; 42 L. T. (N. S.) 679; 28 W. R. 623; *Presbury v. Fisher*, 18 Mo. 50; *Callahan v. Donnolly*, 45 Cal. 52 (1872); *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 7 (1873).

IV. MODERN VIEWS.—As has already been indicated, in referring to the origin and history of the law governing these contracts, a more liberal view is steadily growing in favor of them, and able judges have questioned the reasons for holding them void. The maxim, "competition is the life of trade," is the foundation of the

doctrine. To the common people and to those who have implicit faith in the axiom, the reasons for pronouncing such contracts void have lost none of their original vigor. Their instinctive hatred of monopoly still prevails. But learned judges have doubted that competition always advances commercial enterprises. Judge MAULE once remarked that, were the question *res integra*, he should strongly incline to doubt whether the interests of commerce be really promoted by the prohibition of such contracts. "Many persons who are well informed upon the subject, entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragements were held out to individuals to embark large capital in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient." *Proctor v. Sargent*, 2 Scott N. R. 283, 302 (1840); s. c. 2 Man. & G. 20; see, to same effect, *Palmer v. Stebbins*, 3 Pick. (Mass.) 188 (1825).

(a) *Views of CHRISTIANCY, J.*—In referring to the objection that such contracts, if sustained, fostered idleness, Judge CHRISTIANCY, of the Supreme Court of Michigan, remarked that, in this country, at this time, where a change of occupation is too common to excite remark,—where merchants become manufacturers, and lawyers farmers, and farmers traders,—not because they receive consideration for doing so, but because, with larger opportunities for observation than they had at first, they have fully satisfied themselves that such changes will be for their advantage, as oftentimes they prove to be,—any rule of law which should assume that one who for a consideration bargains not to follow his previous business thereby bound himself to idleness and penury to the detriment of the state, would be a rule absurd in itself and contrary to general experience and observation. "On the contrary," says he, "where such a contract is the result of fair bargaining, the reasonable presumption is, that each party, in view of all the circumstances which are within his own intimate knowledge, was able to see how the bargain was to result to his advantage, and that the party resigning the business did not do so without being fully satisfied that he was receiving full equivalent, which would be more advantageous to him than the property and the business sold. And where a man has fully decided to sell his business to take up another, can there be any reason of state policy, why he should be precluded from bargain-

gaining for the additional consideration he can obtain, by agreeing not to engage in the same business? If a man can sell his business for ten thousand dollars only, but the purchaser will give twice as much in case the seller will agree not to engage in a ruinous competition with him, what interest has the public in denying to the seller the right of selling for this additional sum, or in releasing him from his bargain, if, after he has received it, he shall coolly repudiate this portion of the contract, while he keeps the consideration he has received for it? * * * And it certainly can be no sufficient objection to such a contract, that it may possibly result in one party going beyond the state limits to engage in the same business anew. What if it shall do so? Are our interests as a state so petty or exclusive and our policy so narrow and invidious, that we frame rules to keep people within the state contrary to their inclination, or when it would be for their interest to go elsewhere? Yet this narrow, illiberal and exclusive policy must certainly be relied upon, if the tendency of a contract to induce a contracting party to leave the state is to defeat the contract. If such a position is sound, then a contract made in this state for the services of a citizen at Chicago, or any other point outside the state, should be treated as void here, because depriving the state of the benefit that might flow from the industry of one of its citizens! Or, to take a case still more exactly parallel: Partners in trade at Superior City might divide their stocks, and one, for a consideration, agree that he would remove his share across the river to Duluth, and not again engage in the business at Superior City; but this agreement, though perfectly reasonable, considered with reference to the individual only, would, on this doctrine, be void, because a state policy which has come down to us from semi-civilized or less enlightened times, when governments were accustomed to prohibit artisans from leaving the realm, and gold and silver from being exported, is supposed to be violated by the transfer of the industry and capital of a citizen across a river into another state." *Beal v. Chase*, 31 Mich. 490.

(b) *Views of HOWE, J.*—In referring to the maxim that "Competition is the life of trade," Judge HOWE, of the Supreme Court of Wisconsin, remarked: "But I apprehend that is not true, that competition is the life of trade." On the other hand, that maxim is one of the least reliable of the host that may be picked up in every market place. It is, in fact, the shibboleth of mere gambling

speculations; and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century competition has caused more individual distress, if not more public injury, than the want of competition. Indeed, by reducing prices below, or raising them above values, competition has done more to monopolize trade or to secure exclusive advantages in it, than has been done by contract. Rivalry in trade will destroy itself; and rival trades, seeking to remove each other, rarely resort to contract, unless they find it the cheapest mode of putting an end to strife:" *Kellogg v. Larkin*, 3 Pinney 124, 150.

However valuable these observations may be to the profession, they can be considered but mere *dicta*, coming from able judges, and reflecting the sentiment of a class of thinkers considerably in advance of the notions of a majority of judges who have given opinions upon this subject, as an examination of the adjudged cases will show.

EUGENE MCQUILLIN.

St. Louis, Mo:

(To be concluded in May No.)

RECENT ENGLISH DECISIONS.

High Court of Justice. Chancery Division.

SNOW v. WHITEHEAD.

Houses belonging to A. and B. adjoined one another. A. allowed water to collect in his cellar so that it found its way into B.'s cellar which adjoined, but was somewhat deeper. *Held*, that A. was liable to pay damages to B. for the injury so done to him. *Ballard v. Tomlinson*, 26 Ch. D. 194, differed from.

TRIAL of action.

This was an action, the main object of which was to enforce the provisions of a covenant affecting certain land, to the effect that no house should be erected upon any part of the land of a less value than 400*l*. Damages were also claimed by the plaintiff on the following grounds: In constructing one of the houses (referred to as B. in the evidence) on the land in question, the defendants excavated the ground so as to form a cellar, and put pipes to carry off the water which were not connected with any drain. The rain came down these pipes, flowed into the cellar,

d collected there in a considerable pool. The plaintiff built a house adjoining this house of the defendants. The water in the pool never touched the party-wall. The plaintiff had a cellar of his own under the house adjoining B., which was somewhat deeper than the cellar under B., and the water which the defendants allowed to collect in the cellar of the house B. found its way into the cellar of the plaintiff's adjoining house, and he was put to some expense in getting rid of this water which so came to the cellar of his house. The plaintiff made a claim in this action for damages for the injury done to him.

The main question, as to whether the houses erected upon the land were in conformity with the covenant, turned upon the evidence.

As to the damage caused by the water, an important question arose in consequence of the recent decision in *Ballard v. Tomlinson*, 26 Ch. D. 194, by Mr. Justice PEARSON.

Graham Hastings, Q. C., and *Fryer*, for the plaintiffs.

Robinson, Q. C., and *Boome*, for the defendant.

KAY, J., in a written judgment (after reviewing the evidence), decided that the covenant as to the value of the houses had not been served by the defendants, and then proceeded to deal with the question as to the percolation of the water. After stating the facts above, his lordship proceeded as follows :

The question is whether that was a wrong, and on the part of the defendant I was referred to the case, before PEARSON, J., of *Ballard v. Tomlinson*, 26 Ch. Div. 194, as deciding that it was not a wrong in law in respect of which an action would lie. I have read that case more than once with very great interest and attention, and, with all respect to the learned judge who decided it, I am nearly of opinion that I am bound by authorities of great weight, and not only of considerable antiquity, but also decisions of higher tribunals, which seem to me inconsistent with that decision. The law is very ancient, and is expressed in the maxim, "*Sic utere tuo ut alienum non lædas.*" In the old case of *Tenant v. Golding*, 1 alk. 21, 360, it is stated, "the plaintiff declared that he was possessed of a cellar contiguous to the defendant's privy, and parted by a wall, part of the defendant's house, which the defendant *debut*

et solebat reparare; and that for want of repair the filth of the privy ran into his, cellar, &c.; and after a writ of inquiry it was moved in arrest of judgment that this being a charge laid upon the owner himself, the plaintiff should have shown a title by prescription; *sed non allocatur*, for it is a charge laid on the defendant of common right which, by law, he is subject to. As one is bound to keep his cattle from trespassing on his neighbor's ground, so he must a heap of dung, if he erects it." HOLT, C. J., gave judgment for the plaintiff, saying: "The reason he gave for his judgment in the principal case was because it was the defendant's wall and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbor; and that it was a trespass on his neighbor, as if his beasts should escape or one should make a great heap on the border of his ground and it should tumble and roll down upon his neighbor's. That the case might, indeed, possibly be such that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the defendant's old privy or in a vacant piece of ground which lay next the old privy before, in such case the defendant must defend himself. But that cannot be the case here, for then he could not be bound to repair, and upon the words *debet reparare* he must be acquitted on the trial. But, on the other side, if A. has two houses and the house of office on the one is contiguous to the cellar of the other, but defended by a wall, and he sells this house with the house of office, the vendee must repair the wall; so if he keeps this and sells the other, he himself must repair the wall of the house of office, for he whose dirt it is must keep it that it may not trespass." That case was considered with several other decisions, which are all referred to in the judgment in *Rylands v. Fletcher*, L. R., 3 H. L. 330, which was a case of a man making a reservoir on his own land near to a neighbor's mine and the water which was introduced into the reservoir breaking through some of the shafts flooded the mine and there Lord Chancellor CAIRNS, in giving judgment, stated the principles upon which he thought that case should be determined and in doing so referred to the judgment delivered in the same case by Mr. Justice BLACKBURN, which, in effect, was that the neighbor who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbors, "must keep it in at his peril," and should be

obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

Those authorities, which are of the highest possible kind, have recognised, and again and again affirmed, the rule that any one who brings on his land that which, in a natural state of the land, would not be there—whether it be filth, or water, or anything else—is bound to keep it there, and answerable if it escapes in any way and injures the land of a neighbor, unless it be owing to the neighbor's default. It would be very easy, perhaps, to draw some kind of distinction between *Ballard v. Tomlinson* and those authorities, but I am entirely unable to see any distinction in principle. The short facts of that case were that the plaintiff and the defendant were the owners of adjoining lands, and each having on his land a well of a depth of three hundred feet. The distance between the wells was ninety-nine yards, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and it polluted the water in the plaintiff's well. The defendant did not observe the rule that having brought upon his land filth he was bound to keep it there, and to see that it did not get in any way whatever on to his neighbor's land. The argument in that case seemed to be that the defendant's polluted water would not have got to the other well if his neighbor had not taken water out of his own well, and that by taking water out of his well he drew the water from his neighbor's well on to his own land through his neighbor's land; but he had a right to pump as much water as he liked from his own well. It has been decided that if a man pumps water from his own land, and by so doing drains his neighbor's well dry, there is no wrong or harm in respect of which his neighbor can maintain an action. But if one neighbor poisons his own land so that anybody in the natural use of his well on adjoining land has that poison coming into the water in his well, can it be said that the man who so poisons his land to the injury of his neighbor is keeping in the filth which he is bound to keep in, so that it does not escape? I am not able to draw any material distinction between the case of *Ballard v. Tomlinson* and the other authorities to which I have referred, and I therefore prefer to follow the well-known case of *Tenant v. Golding*, and the series of cases down to *Rylands v. Fletcher*, which affirm very distinctly the proposition that, as an application of the maxim, "*sic utere tuo ut alienum non lædas*," any one who collects upon his own land water

or anything else which would not in the natural condition of the land be collected there, ought to keep it in at his peril; and that if it escapes, he is liable for the consequences. This case seems to me to come within that principle. The matter is no doubt a trifling one, and if the plaintiff had not been right upon the other point, should not have encouraged him in maintaining an action in the division of the High Court for so slight an amount of damages stated to be between three pounds and four pounds. I assess the damages at three pounds. It seems to me that the water which was collected in the cellar of the house erected by the defendants was not kept there by them as it ought to have been, but that it percolated and got into the cellar of the plaintiff's house adjoining thereto, and that seems to me to be a wrong within the decision in *Rylands v. Fletcher*. I accordingly order that the defendants do pay to the plaintiff three pounds as damages.

The foregoing case apparently decides that the defendant was liable for the escape of the water, without any proof of negligence on his part, and the language of *Rylands v. Fletcher*, quoted in the opinion of KAY, J., seems to support that proposition. If so, it is not universally agreed to in America, and *Rylands v. Fletcher* has not been always approved, to its whole extent, at least. For many very respectable courts hold that a person who lawfully collects water on his own premises for his own legitimate use, as the mill-owner who raises a pond on a running stream, is not liable to an owner below, if the dam breaks away and floods his premises, unless the owner of the dam has been guilty of negligence, either in the original erection or subsequent preservation of such dam, and that such negligence must be affirmatively shown by the plaintiff, in order to create such liability. Such seems to be the view held in *Livingston v. Adams*, 8 Cow. 175; *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Wellwood*, 38 N. J. (Law) 339; *Hoffman v. Toulumne Co. Water Co.*, 10 Cal. 413; *Garland v. Tourne*, 55 N. H. 55; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic Plume*

Co., 23 Cal. 225; *Lapham v. Curtis*, Verm. 371, and some other cases.

But of course, where such rule prevails, the degree of care and prudence required of the millowner must be proportioned to the circumstances of each case, and his dam must be properly constructed and maintained for that particular stream, and if the latter is known to be subject to extraordinary and severe freshets, he must construct his dam in a manner naturally calculated to withstand such extraordinary freshets as well as others, even though they may occur at very irregular intervals and only once in several years: *Gray v. Harris*, 10 Mass. 492. And see *Mayor of New York v. Bailey*, 2 Denio 433. Or, as stated in *Shrewsbury v. Smith*, 12 Cush. 177, the owners of a dam are responsible for that degree of care, skill and diligence in the construction and maintenance of their dam which men of common and ordinary prudence would exercise in their own affairs in reference to similar subjects, or such as a man would use if he owned the dam and also the property below.

On the other hand a more stringent rule has been sometimes applied in suc-

cases, and *Rylands v. Fletcher* has been cited with approbation. Thus it was held in *Shipley v. The Fifty Associates*, 106 Mass. 198, that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of such escape."

And this language was quoted and approved in *Gorham v. Gross*, 125 Mass. 238, where GRAY, C. J., says: "The only exceptions to the liability which have been judicially recognised are in case of the plaintiff's own fault, or of *vis major*, the act of God, or the acts of third persons, which the owner had no reason to anticipate." That was a case where a party-wall built by the defendant fell and crushed the building of the plaintiff upon the adjoining lot. The jury found as a fact that either the defendants or the masons employed by them were guilty of negligence, and the main question involved was whether the defendants were responsible for the masons' negligence; but Judge GRAY, apparently having in mind the seemingly different views which have prevailed in regard to *Rylands v. Fletcher*, says: "The present case does not require us to decide whether it is more accurate to say that it is not a

question of negligence, and that the defendant is liable even in case of latent defect, or to say that the fall of the wall, in the absence of proof of inevitable accident or of the wrongful act of third persons, is sufficient evidence of negligence."

Rylands v. Fletcher was followed in *Cahill v. Eastman*, 18 Minn. 324, and apparently the defendants were held liable without proof of negligence. The cases were here very elaborately examined by RIPLEY, C. J. See, also, *Knapheide v. Eastman*, 20 Minn. 479, and many other cases.

It should be remembered, however, that even in *Rylands v. Fletcher*, it was found as a fact that although there was no personal negligence or default on the part of the defendants themselves, "reasonable and proper care were not exercised by the persons they employed to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear;" and the real point involved was whether the defendants were liable for the negligence of the contractors employed by them. See L. R., 1 Ex. 268, 269, 276. The actual decision, therefore, in *Rylands v. Fletcher*, may be sound, even if the *dicta* are disapproved.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

PIOLLET ET AL. v. SIMMERS.

An owner of land through whose property a public highway runs, has an absolute right to use a portion of such highway for certain purposes, for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the travelling public.

The mere exercise of this right of obstruction for a lawful purpose imposes no liability to pay for damages resulting therefrom. It must be an unreasonable or negligent exercise of the right to impose liability.

The owner of land along a highway, who places an object near such highway, on

his land, is not liable if it scares a horse driven along the highway, unless such object is calculated to frighten horses of ordinary gentleness, well broken for travelling upon public highways.

In an action for injuries alleged to have been caused by the fall and death of a horse, occasioned by his taking fright at an object on the highway, witnesses familiar with horses may be asked their opinion as to whether the object was calculated to frighten the horse, and whether the mere fall or the fright could have killed him.

The owners of property through which a highway ran were engaged in whitewashing their fence. In order to do this they used a small barrel mounted on wheels, which was full of whitewash, and which was moved along from time to time as the work progressed. This barrel was left standing, covered over with a cloth and having a shovel projecting a short distance above its top all day Sunday on one side of the beaten track. In an action against such property owners for an injury alleged to have been occasioned by a horse taking fright at this object: *Held*, that the jury should have been instructed that unless there was something of an unusual and extraordinary character in the structure and appearance of this apparatus which would naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it, and that its reasonable use for no longer a time than was fairly required along the highway in whitewashing the defendants' fences would not subject defendants to liability even though some horses might or did take fright at seeing it.

Travelling on Sunday, in such a case, is not a defence which can be set up by a private citizen against a possible liability, if established by the other facts of the case.

In the above case plaintiff having proved that other horses had been frightened by the same object, evidence was held admissible on behalf of defendants to show that those horses were skittish horses. {

ERROR to the Common Pleas of Bradford county.

Case, by Alice Simmers against Victor E. Piollet and Joseph E. Piollet to recover damages for injuries alleged to have been caused by the negligence of the defendants.

On the trial, before MORROW, P. J., the following facts appeared: The defendants are the owners of a large tract of real estate situated in Wysox, Bradford county, Pa. There are several roads running through their lands along which they had constructed post and board fences, which for over twenty years they had been accustomed to whitewash. In the spring of 1881 they had erected a new fence along one of these roads, on both sides of which they owned the land, and in the months of June and July of that year were engaged in whitewashing the same. The whitewash, a preparation of lime and salt mixed in boiling water, was prepared in a heater in the hog-pen of the defendants, a distance from the nearest point of the fence to be whitewashed of one hundred and thirty rods. To get the whitewash to the fence for use a keg or barrel, two feet three inches high and fifteen inches in diameter was placed

upon a small four-wheeled wagon, the wheels of which were twelve inches and fourteen inches in diameter. The length of the wagon was three feet, and breadth two and a half feet. In the keg was a shovel, the handle extending above the keg a distance differently stated by the witnesses from a few inches to two or three feet. The outside of the keg was streaked with lime, and it was covered with a piece of canvas or dark carpet. The wagon, thus rigged, was taken to the hog-pen, the keg filled with the prepared white-wash and then drawn to the place of use, and placed by the side of the fence in the road convenient of access, and as the work progressed was drawn along the fence.

On the afternoon of Saturday, July 9th 1881, this barrel or keg had been filled and taken to a point in this fence two hundred and seventy-five rods from the hog-pen where the whitewash was prepared. At the close of the day it was still half full, and as the workman intended to resume work on Monday morning, he covered up the keg, and left it standing in the road. At this place the road is forty-five and seven-tenths feet wide. On the side next the fence being whitewashed there is a footpath from four to five feet wide, elevated above the road a foot or more. Next is a ditch about four feet wide and from four to five inches below the travelled track.

The surface of the road is composed of small gravel; there are no banks or dangerous places on this road at this point, or above or below it. The truck and keg were placed in the ditch.

On Sunday, July 10th, Henry Waters and the plaintiff left Towanda at four P. M. for a pleasure drive. After driving about fourteen miles they came, about eight P. M., to the point in the road above described, where, the plaintiff alleges, the horse, becoming frightened at the defendants' truck and lime keg, became unmanageable, reared up, plunged sideways and a little ahead, fell down and died instantly. The wagon was overturned and the plaintiff thrown under it, with its weight resting upon her, thereby causing the injuries for which this action was brought.

The plaintiff offered to prove by several witnesses that the obstacle above described tended to frighten horses. Objected to by the defendant because the question did not embrace the words "ordinarily well-broken and road-worthy horses." Objection overruled; exception taken. (First and third assignments of error.)

The plaintiff offered to prove other cases in which horses had

been frightened at the same object in the same position. Objected to by the defendants; objection overruled. (Second assignment of error.)

The defendants called J. G. Dougherty as a witness, who testified that he had had experience with horses for over twenty years; had owned quite a number, owned five at the time he was examined; had seen this horse shortly before his death the same afternoon, and had observed and described his condition, and had seen him immediately after his death. Defendants then asked him: "In your opinion, of what did that horse die?" Objected to by the plaintiff; objection sustained; exceptions. (Fourth assignment of error.)

Defendants then asked the witness the following question: "In your opinion, was that tub calculated, placed upon the road as it was, to frighten an ordinarily well-broken road-worthy horse, or an ordinarily quiet and well-broken horse?" Objected to by plaintiff because it is not sufficient that the obstacle might not have frightened an ordinarily well-broken horse, but that the plaintiff has the right to the highway in such a condition that even skittish animals may be employed without risk. Objection sustained. Exception. (Fifth and sixth assignments of error.)

Robert Ferguson, another witness for the defendants, testified that he had been a blacksmith for over fifty years, had "always handled horses more or less since he was big enough," and had seen horses frightened in various ways. He also testified that he had seen horses fall and thrown to the ground frequently. Defendants then proposed to ask witness the question whether the fall of this horse on its side straight out at full length could have killed it upon this piece of ground. Objected to by plaintiff as incompetent. Objection sustained. Exception. (Seventh assignment of error.)

Defendants then asked the same witness this question: "State to us your opinion whether a horse could be frightened to death at this object that was in the road." Objected to by plaintiff. Objection sustained. Exception. (Eighth assignment of error.)

The defendants also offered rebutting testimony to the effect that the horses that had been frightened by this obstacle were skittish horses. Objected to by the plaintiff. Objection sustained. Exception. (Ninth assignment of error.)

The court charged generally that the public had the right to the

entire width of the highway, and to the use of it; and that if the jury believed that this whitewash-barrel in this small cart or wagon was an object likely to frighten horses and render public travel unsafe, it was negligence on the part of the defendants to leave it in the highway, and they were liable for any injury resulting from such negligence. (Tenth to twenty-first assignments of errors, both inclusive.)

The defendants also requested the court to charge that if the horse behind which the plaintiff was riding at the time of receiving the alleged injury was *skittish*, and in the habit of shying at objects in the highway, and was not quiet and well broken, then the plaintiff cannot recover. Answer. "Refused. But, if the horse was *skittish*, the plaintiff must exercise ordinary care under the circumstances. If he did not exercise such care, then the want of it so as to amount to contributory negligence is matter of defence, and is upon the defence to show it." (Twenty-second assignment of error.)

That the plaintiff cannot recover, because she was unlawfully on the public road on Sunday. Refused. (Twenty-third assignment of error.)

Verdict for the plaintiff for \$1868, and judgment thereon. Defendant took this writ of error.

W. T. Davies and *Williams* (*Angle* and *Ellsbree & Son*, with them), for the plaintiffs in error.

Rodney A. Mercur and *John F. Sanderson* (*Edward Overton, Jr.*, with them), for defendant in error.

The opinion of the court was delivered by

GREEN, J.—The injury for which the present action was brought was occasioned in a peculiar and unusual manner. The plaintiff and another were riding in a carriage along a public road, in the open country, at about eight o'clock in the evening of a day in the month of July, when suddenly the horse drawing the carriage reared, plunged a few steps forward, fell to the ground on the side of the road and instantly died. In falling he upset the carriage, which fell upon the plaintiff and caused the injuries for which the suit is brought. The falling and death of the horse caused the overthrow of the carriage; but what was it that caused the falling and death of the horse? This is perhaps the true

problem of the controversy, but the cause does not seem to have been tried with much reference to its solution. There was an object standing by the side of the road, and quite near to the beaten track, at the place where the horse fell, and it seems to have been assumed that the horse took fright at the sight of this object, and this caused him to rear and fall and die. But this is an unsatisfactory theory. We do not know whether horses ever die from mere fright. No evidence on the subject was received. Some testimony was offered by the defendants to the effect that the horse could not have died of fright, and that his death was due to some other cause; but it was rejected by the learned court below, and that rejection constitutes the substance of several assignments of error. No post-mortem examination of the horse was made, and the cause of justice was thus deprived of what might have proved to be a most important aid in the determination of the catastrophe. No experts in farriery were examined. No veterinary or other medical authorities were invoked, and the case is really barren of testimony from which a satisfactory theory of the animal's death may be derived. It is notorious that horses, like human beings, die suddenly, and of similar diseases. Indeed, one of the medical witnesses testified to that effect in this case. If there were facts which indicated that this horse died from some sudden attack of disease, or opinions of intelligent witnesses to that effect, based upon facts observed by themselves, we think they should have been received in evidence. We think that both the witnesses, Dougherty and Ferguson, gave evidence which sufficiently qualified them to answer the questions proposed to them, but which were rejected. Dougherty had had much experience with horses for twenty years, had owned quite a number, owned five at the time he was examined; he had seen this horse shortly before his death, the same afternoon, and had observed and described his condition; saw him immediately after his death; saw the object which was supposed to have frightened the horse, and testified as to whether it was calculated to frighten horses. In view of all this we think the questions proposed to be put to him should have been allowed, the first one for the reasons above indicated, and the second for the reason here after stated. Ferguson was a blacksmith, had shod horses of many different kinds for over fifty years; had always handled horses "since he was big enough;" had seen horses frightened frequently; it was offered to prove by him that he had seen horses fall, and

brown to the ground many times, and then to inquire whether the mere fall of this horse could have killed him, having reference to the ground where he fell, the witness having seen it. We think he was sufficiently qualified to answer this question, and his opinion should have been received, and also on the subject whether a horse could have been frightened to death by the object at which this horse was supposed to have taken fright. Had the horse run away, and in that manner upset the carriage, there would have been more force in the objections to this testimony. But such was not the fact. He died instantly, and the cause which produced his death probably occasioned his fall, and it was his fall that upset the carriage. Now, the actual physical fact or condition which produced his death cannot be known; and the *moral* condition, so to speak, is a mere matter of theory which requires illustration by the opinions of persons having experience in such matters. For these reasons we sustain the fourth, seventh and eighth assignments of error.

Another question arose on the trial which is presented in several assignments. It relates to the character and qualities of the horse against whose fright precautions are required. It was contended by the defendant that the animal should be an ordinarily quiet and well-broken horse. This was denied by the plaintiff, who contended that an object should be such as would not frighten any kind of horses, whether quiet and well-broken, or skittish and shy. The court adopted the latter view, and refused to allow the defendants to inquire whether the object in this case was calculated to frighten an ordinarily quiet and well-broken horse, or an ordinarily well-broken and road-worthy horse. The same idea was embodied in the answers to points, and in the general charge, where the thought was expressed in the more comprehensive form that if the object was calculated to frighten horses, without any qualification as to their disposition, it would be negligence to expose it to view. In this we think there was error.

There is a certain right of property owners, which we will discuss presently, to leave objects on or along a highway, in front of their premises, temporarily, and for special purposes, and where that right exists it is of equal grade, before the law, with the right of travellers to journey on the highway. Hence in such cases the obligations of each class to the other are equal, and not superior, the one to the other. Each is bound to ordinary care toward the

other, in the exercise of their respective rights, but not to car which is extraordinary. In the more particular application of this doctrine to a case like the present, we think the correct rule is that a property owner who has a lawful right to expose an object on or along a public highway, within view of passing horses, for a temporary purpose, is bound only to take care that it shall not be calculated to frighten ordinarily gentle and well-trained horses. And this seems to be the tenor of the authorities in the cases in which there has been a judicial expression on the subject. Thus in the case of *Mallory v. Griffey*, 4 Norris 275, which was an action to recover damages resulting from the fright of a horse, occasioned by a large stone along the highway, our brother STERRETT said: "It was claimed that the stone was an object calculated to frighten an ordinarily quiet and well-trained horse, and that the defendant was chargeable with negligence in leaving it on the highway. This presented a question of fact which was properly submitted to the jury with the instruction that the plaintiffs could not recover unless they 'found from the evidence that a stone or rock such as was placed in or near the road by the defendant, was, in and of itself, an object calculated to frighten an ordinarily quiet and well-broken horse?'"

In *Morse v. Richmond*, 41 Ver. 435, it was held that a town is liable for such accidents by fright as are the natural result of its neglect to remove any object of frightful appearance so remaining deposited on the margin as to render the whole road unsafe for travel with horses of ordinary gentleness. In *Foshay v. Glen Haven*, 2 Wis. 288, the court said: "We adopt upon this subject the rule established by the Supreme Courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway naturally calculated to frighten horses of ordinary gentleness, may constitute such defect in the way as to render the town liable, even when so removed from the travelled path as to avoid all danger of collision."

In *Ayer v. Norwich*, 39 Conn. 376, CARPENTER, J., said: "In conclusion, we are satisfied that the law is and ought to be so that objects within the limits of a highway which in their nature are calculated to frighten horses of ordinary gentleness, may be nuisances, which make the highway defective within the meaning of the statute."

In *Card v. City of Ellsworth*, 65 Me. 547, the court said: "How far, if at all, the court would be inclined to admit the doctrine adopted in this discussion beyond the facts now before us, we cannot now decide. But in no case like this can a liability of the town exist, unless the object of fright presents an appearance that would be likely to frighten ordinary horses, nor unless the appearance of the object is such that it should be expected by the town that it naturally might have that effect, nor unless the horse was at least an ordinarily kind, gentle and safe animal, and well broken for travelling upon our public roads." The rule is stated in the same way in the cases cited by the defendant in error. Thus, in *Cartlett v. Hooksett*, 48 N. H. 18, SMITH, J., says: "But if objects are suffered to remain (except for the most temporary purposes) resting upon one spot, or confined within any particular place, within the highway, and are of such shape or character as to be manifestly likely to frighten horses of ordinary gentleness, injuries caused by the fright thus occasioned may properly be said to happen by reason of the obstruction or insufficiency of the highway, unless the person placing or continuing those objects upon the highway was, in so doing, making such use of the highway as was under all the circumstances reasonable and proper." To the same effect are *Young v. New Haven*, 39 Conn. 435; *Dimock v. Weyfield*, 30 Conn. 129.

It seems to us it would be difficult to state a rational rule on this subject unless it is accompanied with this limitation. For if persons are bound to guard against frightening skittish, vicious, timid and easily frightened horses, it will not be possible to state any limit of precaution which will be a protection against liability. The reason is that there is nothing as to which it can be definitely said that such horses will not frighten. On this subject the language of our brother PAXSON, in the recent case of *Pittsburgh South-Western Railway Co. v. Taylor*, 15 Weekly Notes of Cases 37, and Leg. Int. of Feb. 29th 1884, is particularly apposite. He said: "The frightening of a horse is a thing that cannot be anticipated, and is governed by no known rules. In many instances a spirited road horse will pass in safety an obstruction that a quiet farm horse will stare at. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside, will sometimes alarm even a quiet horse. I may mention, by way of illustration, that the severest fright I ever knew a horse to feel, was caused by the sun-

light shining in through the windows of a bridge upon the floor. If a farmer may not have a barrel of cider, a bag of potatoes, horse power, a wheelbarrow or a wagon, standing on his own premises by the side of a highway, except at the risk of having his whole estate swept away in an action for damages occasioned by the fright of an unruly horse, the vocation of agriculture will become perilous indeed. These views lead us to the conclusion that the court below was in error in its treatment of this subject, and we therefore sustain the first, third, fifth, sixth, eleventh, twelfth, fourteenth and fifteenth assignments. We see no objection to allowing proof of specific cases of fright at this particular object, and, therefore, do not sustain the second assignment.

Another subject of complaint by the defendants is the restrained and limited manner of defining the defendants' rights adopted by the court, and their subordination, when stated, as rights of inferior grade to those of the travelling public, and, therefore, to those of the plaintiff. The defendants are farmers. They own a considerable body of land lying on both sides of the public road at the place where the accident happened. For some time before and after the accident they were engaged in whitewashing their fences, extending a considerable distance along the road. The road at this place was upwards of forty-five feet in width, the road-bed actually travelled being twenty-two feet wide. The distance from the track to the fence on the south side was thirteen and a half feet, and in this space there was a slope downwards of two and nine-tenths feet, a little steeper near the road than for the remainder of the distance. The surface of the road and slope was composed of small gravel. Next the fence was a raised footpath, about four and a half feet wide, and next to the path was a ditch four feet wide and four tenths of a foot below the travelled track. In this ditch stood a small truck on wheels, about two and a half by three feet, the wheels being twelve to fourteen inches high, and on the truck was a small barrel about fifteen inches in diameter and two feet three inches high. A pole or stick projected above it, the height of which above the barrel is differently stated by the witnesses from a few inches to two or three feet, and a small piece of carpet covered the pole and barrel. The outside of the barrel was streaked with lime, and the barrel itself contained the lime with which the whitewashing was done. This is the object which, it is claimed for the plaintiff, caused the horse to frighten, and thereby produced his

ll and death. It was moved along the road as the work progressed, and was left standing in the ditch from Saturday night to Monday morning, covering the Sunday when the accident occurred, partly filled with lime prepared for use.

The learned court did instruct the jury that the defendants had a right to use any part of the highway for the purpose of building and improving their fence, provided they did not interfere with the rights of travellers; and that, if the lime tub was calculated to frighten horses, it would be negligence to use it, because all citizens had a right to pass without having their horses frightened by any obstruction placed on the highway. The learned judge also said that the public had a right to travel over every part of the highway; that everything between the fences was highway, and the public had the right to use any part of it they saw fit. It seems to us this is not a sufficiently precise designation of the relative rights of the property owners and the public. As we understand the law, there is an absolute right in the property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the travelling public. Thus, in 2 Dill. on Municipal Corporations, § 581, the writer says: "We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even though not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in the temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvements of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to, or limitations of it. They can be justified only when and only so long as they are reasonably necessary."

In the case of *Commonwealth v. Passmore*, 1 S. & R., on p. 219,

TILGHMAN, C. J., said: "No man has a right to throw wood or stones into the street at his pleasure. But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stone, bricks, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner."

The foregoing case was an indictment or a nuisance, where the question was simply whether the obstruction in question was a nuisance; but the case of *Palmer v. Silverthorn*, 8 Casey 65, was an action to recover damages for the broken leg of an ox which had wandered among a parcel of building materials placed by the defendant in the highway in front of his premises while erecting a building. Here a practical question of liability for damages arose, and it was determined for the defendant, because, although his materials were an obstruction to the street, they were lawfully there, and he was not responsible if he left sufficient room for the travel of the street. The case of *Commonwealth v. Passmore*, was cited and approved, and a similar case from 1 Denio 524, was quoted, in which the same doctrine was declared. THOMPSON, J., said the necessity of the case was probably the foundation of the rule, "but the practice has become a custom of such long standing that it is regarded as a law, and the right will not be defeated by an investigation into the necessity of so doing in any particular case. It is a right to be exercised under responsibility for all injury arising from an unreasonable or negligent use of it." In *Mallory v. Griffey*, *supra*, which was an action for damages for an injury inflicted by a horse taking fright at a stone placed in the highway as a part of some building materials to be presently used, we affirmed the court below in charging that the defendant was not liable, although the horse took fright merely because the stone was in the highway. Mr. Justice STREET said: "The jury were properly instructed that the defendant might place building material on a portion of the highway, and permit the same to remain there for a reasonable length of time for the purpose of erecting his barn on the line of the road, without, on that account alone, incurring liability for injuries sustained by persons passing along the road, provided ample room was left for the free passage of vehicles and animals; but he would be liable for injuries occasioned by an unreasonable or negligent use of the highway." All this doctrine was repeated by the present Chief

Justice in the case of *City of Allegheny v. Zimmerman*, 14 Norris 287, who further said: "But the right to partially obstruct a street does not appear to be limited to a case of strict necessity; it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel."

The substance of the doctrine is that the mere exercise of the right of obstruction for a lawful purpose, imposes no liability to pay for damages resulting therefrom. It must be an unreasonable or negligent exercise of the right, in order to impose liability. To say that a man may lawfully deposit bricks and lumber on the highway, in front of a lot on which he is erecting a building with those materials, and yet if their presence has a tendency to frighten horses, and some over-sensitive horse does take fright at them and runs away and causes damage, the person depositing the materials is guilty of negligence, and shall pay the damage, is merely giving a right with one breath and taking it all away with another. In practical effect such a right would be no right at all. Any pile of bricks, stones, sand, lumber, or other building material, in a street, *has a tendency* to frighten horses, and in almost any community there could always be found some horses that would actually take fright at seeing them. But that circumstance alone will not take away the right to deposit them in such a place. There must be some abuse of the right, some unusual and extraordinary mode of arranging the materials, such as will probably produce fright with ordinary gentle and well-trained horses, before it can be fairly said liability arises. So in the present case. The defendants were whitewashing their fences—a perfectly proper and legitimate thing to do. The fence extended along a great length of the public road, and the process of whitewashing necessarily occupied considerable time. In this respect there does not seem to be anything unreasonable in the case. They used a small barrel to contain their material, the whole size of the vessel and its supporting truck not exceeding two and a half feet by three feet superficially, and three feet perpendicularly. It is difficult to see anything unreasonable or negligent in using such an apparatus. It stood by the side of the travelled track, and made no encroachment upon it of any kind. It therefore did not obstruct the highway so as to interfere with the travel upon it. It seems to us the jury should have been told that unless there was something of an unusual and extraordinary character in the structure and appearance of this apparatus which would

naturally tend to frighten horses of ordinary gentleness and training, it was not negligence to use it, and its reasonable use for no longer time than was fairly required, along the highway, in white-washing the defendants' fences, would not subject defendants to liability, even though some horses might or did take fright at seeing it.

These views require us to sustain, as we do, the tenth, eleventh, twelfth, thirteenth, fourteenth, sixteenth, eighteenth, nineteenth, twentieth and twenty-first assignments. We do not sustain the twenty-second, because it is of too limited a scope to cover all the conditions of liability; nor the twenty-third, because the presence of the plaintiff on the road on Sunday is not a defence which can be set up by a private citizen against a possible liability, if established by the other facts of the case: *Mohney v. Cook*, 2 Casey 342; *Ranch v. Lloyd*, 7 Id. 369. We sustain the ninth assignment, for the reason that evidence being admissible to show the frightening of particular horses at sight of this object, it is competent to show that those horses were not of ordinary gentleness and training.

Judgment reversed and *venire de novo* awarded.

Temporarily Obstructing a Street.—With regard to obstructing a street, the law in *Rex v. Russell*, 6 East 427, is very well stated: "That the primary object of a street is for the free passage of the public, and anything which impeded that free passage, *without necessity*, was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could be conveniently contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

In a Pennsylvania case it was said: "*Necessity* justifies actions which would otherwise be nuisances. This necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it car-

ried to his house, and it may lie there a reasonable time. So, because building is necessary, stone, brick, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner." *Commonwealth v. Passmore*, 1 S. & R. 217; approved in *People v. Cunningham*, 1 Denio 524, 530, and in *Clark v. Fry*, 8 Ohio St. 358, 374. Such instances as those enumerated in the Pennsylvania case, it is said in the Ohio case, "are not invasion of, but simply incident to, or rather qualification of, the right of transit; the limitation upon them is that they must not be *unnecessarily* and *unreasonably* interposed or prolonged."

In a Massachusetts case it was said: "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and acquiescence of the public is evidence of the right. The owner of land

make such reasonable use of a way forming his land as is usually made by persons similarly situated. As to the reasonableness of the use, it may well be held down that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the sides of the street, and to place doors and windows in them so as when opened to look over the street. When the owner of a lot in such a situation has occasion to build, and, for that purpose, to dig up materials and earth within the limits of the street, provided he takes care not to improperly to obstruct the same, and to move them within a reasonable time. It is very obvious that, without this privilege, it would be, in some situations, early or quite impracticable to build at all. *O' Linda v. Lothrop*, 21 Pick. 292. Thus, in an action for special damages against the author of an obstruction, it was held that a street of a city may be obstructed by placing material for building in it for a reasonable time and so as occasion the least inconvenience, if, from a want of room elsewhere, it be reasonably necessary to deposit in the street: and a plea is defective which does not aver or show this reasonable necessity, as it cannot be judicially inferred from the fact that the building was being erected in a populous city: *Wood v. Sears*, 21 Ind. 515.

In addition to the cases already cited, the following cases support the doctrine of the principal case and the cases already cited in this note: *Rez v. Jones*, 3 Camp. 230; *Rez v. Ward*, 4 A. & E. 405; *Rez v. Cross*, 3 Camp. 226; *St. John v. New York*, 3 Bosw. 483; *Cline v. Cornwall*, 21 Grant (Canada) 142.

A street or sidewalk cannot be habitually used for delivery of distillery slops through pipes: *People v. Cunningham*, 1 N.Y. 329; or for wagons continually loading to receive goods: *Rez v. Russell*, 6 East 427; or receiving barrels

from a cider press: *Dennis v. Sipperly*, 17 Hun 69; or for sawing timber, *Rez v. Jones*, 3 Camp. 230; nor can a person obstruct a street with carriages, even where he has been in the habit of so doing for a long time: *Gerring v. Barfield*, 16 C. B. (N. S.) 597; nor can a stage-coach stand in a street to ply for passengers, although it may so stop to put down or take up passengers: *Rez v. Cross*, 3 Camp. 224.

In the case of a stage coach it was held that if it stopped for an unreasonable time on a public highway, in front of and obstructing the entrance to a camp-meeting ground, it might lawfully be "moved on" by the person in charge of the ground. The court said: "Persons have a right to travel over public streets and roads, stopping only for necessary purposes, and then only for a reasonable time. Stage coaches may stop to set down and take up passengers, as this is necessary for public convenience; but this must be done in a reasonable time. A person travelling on the highway must do so in such a way as not unnecessarily or unreasonably to impede the exercise of the same right by others; and if he does not exercise this right in a reasonable manner, he is guilty of a nuisance [citing authorities]. The proof in this case clearly shows that the coach of the appellee, by remaining in the highway, under the circumstances as testified to by nearly all the witnesses on both sides, obstructed the travel over it for an unreasonable time, and was a public nuisance. Without stopping to inquire whether any one whose rights are not injured or interfered with by a public nuisance may abate it, about which there is some conflict in the decisions, there can be no doubt whatever that any person whose rights are injured or interfered with may abate it, provided its abatement does not involve a breach of the peace:" *Turner v. Holtzman*, 34 Md. 148.

In *State v. Edens*, 85 N. C. 522, the defendant was indicted in a common-law indictment with maintaining a nuisance by obstructing a street in that he kept a market cart in the street for an hour and a half, and the jury rendered a special verdict finding that he was notified to remove the same, but refused; that he and a number of other persons were accustomed to occupy places on the street with their carts, selling vegetables, etc., but that it was contrary to the municipal regulations, and that notwithstanding the alleged obstruction, there was the usual passing of vehicles and foot-passengers. It was held not to be *per se* a nuisance.

A temporary obstruction does not amount to such an obstruction as subjects the person placing it there, in all cases, to an action liable. Thus, a temporary and necessary use, such as the delivery of barrels from cars on skids across a sidewalk, is permissible, provided a sufficient space is left on the other side of the roadway: *Mathews v. Kelsey*, 58 Me. 56; s. c. 4 Am. Rep. 248.

In *Goldsmith v. Jones*, 43 How. Pr. 415, the plaintiffs, who occupied a store adjoining the defendant's, built a box around a telegraph pole, projecting two and a half feet on the sidewalk, using it as a sign; the defendant obliterated the name on the side, and this was held to be a malicious trespass. The court went further, and said that the only allowable act of abating would be the removal of the box, and this could not be justified unless it specially incommoded the defendant in his use of the street or sidewalk.

Distributing hand-bills on the street whereby a crowd was gathered, was held not indictable: *Rex v. Sarmon*, 1 Burr 516. Where a village ordinance provided that the sidewalk in front of certain stores should be fourteen feet wide, and that the outside ten feet should be of uniform grade and kept clear of all obstructions, but the inside four feet

were left ungraded and were occupied for stairways, show-tables, etc., by the owners of the stores, and plaintiff, with the four feet in front of one of the stores and by the authority of the owner, kept a fruit and candy stand, it was held that the stand was not an obstruction to the sidewalk, and the plaintiff was not liable to arrest by a peace officer for keeping the same, although a crowd may have collected in front of it so as to obstruct the street: *Barling v. West*, 29 Wis. 36. But a person is a trespasser who, instead of passing along on the sidewalk of a street, stops in front of a man's house and remains there, using towards him abusive and insulting language: *Adams v. Rivers*, 11 Barb. 390. Nor may one warn the public from another's shop or with a placard inscribed "Beware Mock Auctions:" *Gilbert v. Mickle*, Sandf. Ch. 357. Nor has any one the right to display such goods or signs in his shop windows, or to collect a constant crowd on the sidewalk, obstructing public travel—for instance, satirical effigies: *Rex v. Carlile*, 6 C. & P. 628; nor can a constable hold an auction: *Com. v. Milliman*, 13 S. & R. 403; *Com. v. Pettibone*, *supra*.

So a wooden awning in front of a store is not *per se* a nuisance. The court said: "Hawkins, who owns a hotel building in Ypsilanti, filed his bill to restrain the defendant, who owns a neighboring store building, from maintaining a wooden awning in front of his premises. The complainant's theory seemed to be that this is a public nuisance which injuriously affects him specially. The awning is, so far as we can see, no more of a nuisance than it would have been made from any other material, and it was not, as shown from the evidence, such a structure as any court would regard as a public injury or grievance. It was such as was used habitually in Ypsilanti as well as elsewhere, and was recognized by the city ordinance as not objectionable. It was, therefore, no more than

use of defendant's own property. The special grievance complained of is simply that it obstructed the view of the sidewalk and a portion of the street. The testimony does not indicate that there was any very well founded objection in fact to the awning, and there is no legal objection to it:" *Hawkins v. Sanders*, 45 Mich. 491.

But a fruit stand, a permanent structure three feet eleven inches wide, seven feet high and twenty-three feet long, on the inside of a sidewalk fifteen feet wide, is a nuisance *per se*: *State v. Berdett*, 10 Ind. 185; s. c. 38 Am. Rep. 117; 1 Amer. L. Reg. 342; *Com. v. Wentworth*, Brightly's Rep. (Penn.) 318. See *Wells v. State*, 12 Tex. App. 615. So placing large quantities of stone in a public highway is indictable: *Com. v. Rogers*, 13 Met. 115; or keeping a cart and machinery for the purpose of taking photographic sketches: *Queen v. Davis*, 10 U. P. Can. C. P. 575; or a projecting show-board: *Read v. Perrett*, L. R., 1 Ex. Div. 349. See *Original Hartford Collieries Co. v. Gibb*, L. R., 5 Ch. 713.

So a railway company cannot turn a street into a car-yard: *Vars v. Grand Trunk Ry. Co.*, 23 U. P. Canada (C. P.) 143. So if a street railway unreasonably uses a street in front of a lot for hitching and storing cars to the injury of the owner of the lot, such owner may maintain an action therefor: *Mahady v. Mahanick Rd. Co.*, 91 N. Y. 148; s. c. 42 Am. Rep. 661.

A horse unlawfully at large on a highway is a nuisance, and its owner is liable for any damages done by it, whether the animal is vicious or not: *Baldwin v. Main*, 49 Conn. 113; s. c. 44 Amer. Rep. 205.

Objects Frightening Horses.—The quotations from cases of frightening horses are unusually full, and no other need be made. A few instances will be cited. The plaintiff's horse became frightened

by a rock in the defendant's highway in a situation calculated to frighten horses, and the plaintiff in attempting to dismount was injured. It was held that if the horse was unmanageable, and the plaintiff was dismounting to avoid danger, the defendant was liable, but if the horse was manageable, and the plaintiff dismounted to avoid apprehended difficulty, the defendant was not liable; and further that the defendant was liable for the injury occurring from the fright of the horse at the rock, although neither the horse nor the carriage came into contact with the rock, the horse being ordinarily safe and gentle: *Card v. City of Ellsworth*, 65 Me. 547; s. c. 20 Amer. Rep. 722. But see *Agnew v. Corunna*, 21 N. W. Rep. 873.

A town is not liable for damages sustained by a traveller from the fright of his horse at meeting cows in the road with boards on their horns, and also from a defect in the way; the combined action of both cases operating to produce the accident: *Perkins v. Inhabitants of Fayette*, 68 Me. 152; s. c. 28 Am. Rep. 84; see *Moulton v. Sandford*, 51 Me. 127.

Where a horse scared and shied at a hole in a turnpike, the company was held liable: *Brooksville, &c., Co. v. Pumphrey*, 59 Ind. 78; s. c. 26 Amer. Rep. 76.

If a city allows wild animals exhibited in the streets, it is liable if they frighten horses which run away and do damage to their owner: *Little v. City of Madison*, 42 Wis. 643; s. c. 24 Am. Rep. 435.

"A hollow, black and burnt log" was held to entitle to a recovery under certain circumstances: *Foshay v. Town of Glen Haven*, 25 Wis. 288; s. c. 3 Amer. Rep. 73; so the blowing of a steam-whistle of a factory near a highway: *Knight v. Goodyear's India Rubber Glove Manufacturing Co.*, 38 Conn. 438; s. c. 9 Am. Rep. 406; *Parker v. Union Woollen Co.*, 42 Conn. 399.

A steam traction engine, or roadster, is not a nuisance *per se* when used on a

public highway: *Macomber v. Nicholls*, 34 Mich. 212; s. c. 22 Am. Rep. 522; and the one using it is not liable at all unless it would frighten ordinary horses: *Watkins v. Reddin*, 2 F. & F. 629; see *Smith v. Stokes*, 4 B. & S. 84, and *Harrison v. Leaper*, 5 L. T. (N. S.) 640; See *Turner v. Buchanan*, 82 Ind. 147; s. c. 42 Am. Rep. 485; nor a company for cars running over a bridge across a highway: *Favor v. Boston & Lowell Rd. Co.*, 114 Mass. 350; s. c. 19 Am. Rep. 364. There is a liability, however, for leaving a steam roller over Sunday on the highway: *Young v. New Haven*, 39

Conn. 435; see *Harris v. Mobbs*, 3 E. Div. 268; s. c. 31 Moak 252.

But a tent in the highway is such object as to frighten horses of ordinary gentleness: *Ayer v. City of Norwich*, Conn. 376; s. c. 12 Am. Rep. 396; a derrick used by a railroad company: *Jones v. Housatonic Rd. Co.*, 107 Mass. 261. See *Howard v. North Bridgeport*, 16 Pick. 189; *Keith v. Easton*, 2 Al. 552; *Kingsbury v. Dedham*, 13 Mass. 186; *Lawrence v. Mt. Vernon*, 35 N. H. 100; *Jewett v. Gage*, 55 Id. 538.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Iowa.

MOORE v. MONROE ET AL.

An injunction will not be granted to restrain the reading or repeating of Bible, or parts thereof, or the singing of religious songs, in a school, at the suit of a tax-payer whose children are not required to be present during such exercises.

Section 1764 of the Iowa Code, providing that "the Bible shall not be excluded from any school or institution in the state, nor shall any pupil be required to read contrary to the wishes of his parent or guardian," is not in violation of article 2 3, of the bill of rights.

APPEAL from Davis District Court.

The plaintiff, as a resident and tax-payer of the independent district of Bloomfield, and patron of the public school taught in that district, brings this suit against the teachers of the school and the directors of the district, and prays for an injunction to prevent the reading or repeating of the Bible, or any part thereof, in the school, and to prevent the singing of religious songs in the school. The court refused to grant an injunction, and from the order of refusal the plaintiff appeals.

F. W. Moore and *S. N. Steele*, for appellant.

S. S. Carruthers and *Payne & Eichelberger*, for appellees.

The opinion of the court was delivered by

ADAMS, J.—The record shows that the teachers of the school are accustomed to occupy a few minutes each morning in reading selections

tions from the Bible, in repeating the Lord's prayer, and singing religious songs; that the plaintiff has two children in the school, but that they are not required to be present during the time thus occupied. The record further shows that the plaintiff objected to such exercises, and requested that they be discontinued; but the teachers refused to discontinue them, and the directors refused to take any action in the matter.

The plaintiff concedes that under a statute of Iowa, section 1764 of the Code, if constitutional, neither the school directors nor courts have power to exclude the Bible from public schools. The provision of the statute is in these words: "The Bible shall not be excluded from any school or institution in this state, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." Under this provision, it is a matter of individual option with school teachers as to whether they will use the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian. It was doubtless thought by the legislature that an attempt on the part of school boards to exclude, by official action, the Bible from schools, would result in unseemly controversies, to be decided ultimately at the polls, and that such controversies would naturally disturb the harmony of school districts, and impair the efficiency of schools. Whether the provision is a wise one, it is unnecessary for us to express any opinion. It is the law of the state, unless unconstitutional.

The plaintiff insists, however, that it is unconstitutional. The provision of the constitution which it is said to conflict with is article 1, § 3, bill of rights. The provision is in these words: "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship; and so his children are compelled to attend a place of worship, and he, as a tax-payer, is compelled to pay taxes for building and repairing a place of worship.

We can conceive that exercises like those described might be

adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow, from such concession, that the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship within the meaning of the constitution, we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.

It is, perhaps, not to be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position; yet we cannot think that the people of Iowa, in adopting the constitution, had such extreme view in mind. The burden of taxation by reason of the casual use of a public building for worship, or even such stated use as that shown in the case at bar, is not appreciably greater. We do not think, indeed, that the plaintiff's real objection grows out of the matter of taxation. We infer from his arguments that his real objection is that the religious exercises are made a part of the educational system, into which his children must be drawn or made to appear singular, and perhaps be subjected to some inconvenience. But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regarded it as of greater weight than we do, we should have to say that we do not find anything in the constitution or law upon which the plaintiff can properly ground his application for relief. Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission.

We think that the injunction was properly denied.

Affirmed.

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| Neither the Federal government nor any state government can make any law | respecting an establishment of religion: Const. U. S., Amend. 1; 2 Kent's Com. |
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35 *et seq.*; Rawle on Const. 121; Story on Const., sec. 1879; *Reynolds v. U. S.*, 98 U. S. 145, and the state constitutions generally. An ordinance giving a special privilege to one sect infringes this principle: *Shreveport v. Levy*, 26 La. An. 671.

Nor can either State or Federal government compel attendance upon religious worship, nor hinder the free exercise of religious belief and expression: *Cooley* Const. Lim. 470, *et seq.* But a law is not unconstitutional because it forbids what one may conscientiously think right or requires what one may conscientiously think wrong: *Donahoe v. Richards*, 38 Me. 376; *Ferriter v. Tyler*, 48 Vt. 444; *Reynolds v. U. S.*, 98 U. S. 145.

Nor can either government, as a general rule, impose any tax for religious purposes; but otherwise in New Hampshire: Const., pt. 1, art. 6; and see, also, *Barnes v. First Parish*, 6 Mass. 401. It has been said that "religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state." And the use of a school-house for religious meetings, when not required for school purposes, is not unconstitutional: *Nichols v. School Directors*, 93 Ill. 61; s. c. 34 Am. Rep. 160; *Townsend v. Hagan*, 35 Iowa 195; *Davis v. Bogert*, 50 Id. 11. But it has been held, on the other hand, that such use is not allowable: *Spencer v. School Dist.*, 15 Kan. 259; s. c. 22 Am. Rep. 268; *Dorton v. Hearn*, 67 Mo. 301; *School Dist. v. Arnold*, 21 Wis. 657; *Scotfield v. School Dist.*, 27 Conn. 499. And in Ohio, that they have no power to lease it for holding a select school: *Weir v. Day*, 35 Ohio St. 143.

The powers of school boards are limited to those expressly granted and those resulting by necessary implication from those granted: *Stevenson v. School Directors*, 87 Ill. 255; *Wells v. People*, 71 Id. 532; *Clark v. School Directors*, 78

Id. 474; *Peers v. Bd. of Ed.*, 72 Id. 508; *School Directors v. Fogleman*, 76 Id. 189; *State v. Omaha*, 7 Neb. 267; *Gehling v. School Dist.*, 10 Id. 239; *Manning v. Van Buren*, 28 Ia. 332; *Bank v. Coffin's Grove*, 51 Id. 350; *Adams v. State*, 82 Ill. 132; *State v. Bd. of Ed.*, 35 Ohio St. 368. They have power to dismiss or exclude a pupil from school, when necessary to maintain good order and government: *Stephenson v. Hall*, 14 Barb. 222; *Sewell v. Bd. of Ed.*, 29 Ohio 89; *Hodgkins v. Rockport*, 105 Mass. 475; *Ferriter v. Tyler*, 48 Vt. 444; *Bd. of Ed. v. Thompson*, 33 Ohio St. 321; *Burdick v. Babcock*, 31 Ia. 562; *Murphy v. Directors*, 30 Id. 429; *Spear v. Cummings*, 23 Pick. 226. And are not liable for an error in judgment in so doing: *Dritt v. Snodgrass*, 66 Mo. 286; *McCormick v. Burt*, 95 Ill. 263; *Donahoe v. Richards*, 38 Me. 376. They have general power to make rules for the government of the school, but such rules must be reasonable: *Sherman v. Charleston*, 8 Cush. 160; *Guernsey v. Pitkin*, 32 Vt. 225; *Ward v. Flood*, 48 Cal. 36; *Donahoe v. Richards*, 38 Me. 376; *Roe v. Demig*, 21 Ohio St. 66; *Rulison v. Post*, 79 Ill. 567; *School Trustees v. People*, 87 Ill. 303. What are reasonable rules is a question of law: *Thompson v. Beaver*, 63 Ill. 353. In some states a rule requiring pupils to pursue particular studies is considered reasonable: *Secell v. Bd. of Ed.*, 29 Ohio St. 89; *Guernsey v. Pitkin*, 32 Vt. 225; and in *State v. Mizner*, 50 Iowa 145; s. c. 32 Am. Rep. 128, it was held that while a pupil may not be chastised for not pursuing a study to which the parent objects, he may be expelled. In Illinois and Wisconsin, on the other hand, it is held that a pupil cannot be required to pursue a study when the parents request that he be excused from so doing: *School Trustees v. People*, 87 Ill. 303; *Rulison v. Post*, 79 Id. 567; *Morrow v. Wood*, 35 Wis. 59; s. c. 17 Am. Rep. 471.

A rule requiring the school to be opened with religious exercises, where attendance upon such exercises is not obligatory, has elsewhere been held to be a reasonable rule; and during such exercises all pupils may be required to lay aside their books, observe good attention, and bow the head during prayer: *Spiller v. Woburn*, 12 Allen 127; *McCormick v. Burt*, 95 Ill. 263. Some decisions have gone further, and have held that pupils may be required to read the Bible, as a school exercise, even against the protest of the parents: *Donahoe v. Richards*, 38 Me. 376; *Wull v. Cooke*, 7 Am. Law Reg. (O. S.) 417.

It is, however, equally competent for the school board to exclude the Bible from the school where its presence is not expressly required by law: *Bd. of Ed. v. Minor*, 23 Ohio St. 211.

It has been held that a request from

parents and spiritual adviser that pupils be excused from school to attend religious exercises will furnish no valid excuse for such absence, and that for such absence pupils may be excluded from the school: *Ferriter v. Tyler*, 48 Vt. 444. As to general power to expel for absence, see *Burdick v. Babcock*, 31 Iowa 562; *King School Dd.*, 71 Mo. 628; s. c. 36 Am. Rep. 499; *Russell v. Lynnfield*, 116 Mass. 365.

While the decisions in some of the cases cited seem to carry the principle to an unnecessary extent, that laid down in the principal case seems reasonable, and we have been unable to find any authorities holding an opposite view. See 2 Kent's Com. *196, note "j," latter part; 2 Story on Const., sec. 1871, 1873.

M. D. EWELL.

Chicago.

Supreme Court of Ohio.

BLANDY'S ADMINISTRATOR v. HALL & CO.

Mortgages invalid against the creditors of a mortgagor are invalid against his assignee for the benefit of creditors.

The lien of such a mortgage is not preserved by a clause in the assignment excepting from its operation all existing liens and providing that such liens shall not be affected thereby.

Where a statute requires the entry, on a chattel mortgage, of a certain statement, a defect in such statement cannot be cured by conditions contained in the mortgage but not referred to in the statement.

ERROR to the District Court of Washington County.

On the 9th of February 1867, John L. Taylor executed to Henry Blandy a chattel mortgage on certain property therein described, to indemnify Blandy as surety for Taylor on certain indebtedness therein specified. On this mortgage was entered a statement verified under oath as follows:

"THE STATE OF OHIO, MUSKINGUM COUNTY, ss.

Henry Blandy, mortgagee, being duly sworn, upon his oath says that the within-named mortgagor, John L. Taylor, is indebted

to him in the sum of \$1030, with interest; that the said claim is just and unpaid; and that to secure the payment of the same, the within mortgage has been executed to him in good faith.

HENRY BLANDY."

On the 31st of March and the 16th of April, respectively, Taylor executed to Blandy other chattel mortgages, similar in all respects to the foregoing, except as to names, dates, amounts and description of property. These several mortgages were duly filed.

On the 19th of April 1877, Taylor executed to one Alexander Johnson a deed of assignment for the benefit of his creditors, describing certain property, real and personal. This deed contains the following clause :

"This conveyance includes all the real and personal property owned by me, whether specifically described herein or not, excepting from the operation of this assignment all existing liens, which are not to be affected hereby; excepting therefrom and saving and reserving to the said John L. Taylor his homestead, and all other rights and property to which he may be entitled under the homestead exemption or other laws of Ohio."

This deed was duly filed in the probate court, in Muskingum county, and subsequently Henry Blandy was appointed trustee for the benefit of creditors in the place of Alexander Johnson, assignee.

Henry Blandy, as successor of Johnson, converted the assigned property, including the chattels embraced in the foregoing mortgages, into money, and filed in the probate court his account, claiming a credit of \$1082.78 on account of moneys paid as surety for Taylor, under the chattel mortgages aforesaid.

The probate court allowed the credit claimed by Blandy, holding the mortgages to be valid liens against the general creditors of the assignor.

The creditors, Benedict, Hall & Co. and others, appealed from this judgment to the Court of Common Pleas, Muskingum county, where the preference of Blandy's mortgages over the claims of general creditors was denied. The judgment of the Common Pleas, on error, was affirmed by the District Court.

Moses M. Granger and A. W. Train, for plaintiffs in error.

John King, T. J. Taylor and J. T. Crew, for defendant in error.
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The opinion of the court was delivered by

McILVAINE, J.—Two questions are presented in this case: 1. In the administration of the assigned estate, did the mortgage of Blandy have priority over the claims of other creditors? 2. If not, did the exception of liens in the deed of assignment give precedence to Blandy over the other creditors?

1. At the time these mortgages were executed it was provided by statute that every mortgage of goods and chattels shall be absolutely void, as against the creditors of the mortgagor, unless the mortgagee, his agent or attorney, "in case the said instrument shall have been given to indemnify the mortgagee against a liability as surety for the mortgagor, shall enter thereon a true statement of such liability, and that said instrument was taken in good faith to indemnify, against any loss that may result therefrom," &c. : S. & C. 475, § 1, and 66 Ohio L. 345, § 2.

In *Hanes v. Tiffany*, 25 Ohio St. 549, it was held that the omission to enter upon a chattel mortgage the statement required by the statute, renders the mortgage void as against the creditors of the mortgagor, and a mortgage void as to creditors is void as against the assignee for the benefit of creditors. But, in *Gardiner v. Parmelee*, 31 Ohio St. 551, it was held where the affidavit (statement) refers to matters contained in the mortgage, the matters thus referred to are to be regarded as part of the affidavit (statement). These cases are referred to and approved in *Nesbit v. Wortz*, 37 Ohio St. 378, and, we think, are conclusive on the question now under consideration. These mortgages of Blandy were given to indemnify him against a liability as surety for the mortgagor. This fact is stated in the mortgages, but such statement is not entered on the mortgage nor verified by the affidavit of the mortgagee, nor is it referred to in the affidavit. The statement in the affidavit simply is that the mortgagor is *indebted* to the mortgagee in the sum named; that the *said claim* is just and unpaid; and that to secure the payment of *the same*, the within mortgage has been executed to him in good faith. This is not a true statement of the liability as surety against which the mortgage purports to be indemnity, and no reference is made in the affidavit to any matter that can supply the omission.

We admit that a substantial compliance with the requirement of the statute is sufficient. What does the statute require? That the

mortgagee shall state, under oath, what the liability is for which he is bound as surety, and the mortgage was given in good faith to indemnify him against loss as surety from such liability. The affidavit states the mortgagor is indebted to the affiant, and that the mortgage was given in good faith to secure the payment of such debt. No reference is made to the contents of the mortgage, and for that reason we think the mortgage is void as against the creditors of the mortgagor.

2. As to the next question. The deed of assignment "excepts from the operation of the assignment all existing liens which are not to be affected thereby." By no fair interpretation of this clause can it be said that the assignor intended to except from the operation of the assignment his equity of redemption in the mortgaged property. The assigned estate was administered on the theory that the equity of redemption passed to the assignee for the benefit of creditors. What, then, was the purpose of this clause? We think there can be no doubt that the intention was to secure the mortgagees the full amount of their liens to the extent that such liens were valid as against the assignor.

Can such purpose be accomplished by such means? We think not. Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors. By the assignment the rights of creditors passed to the assignee as matter of law. The possession of the assignee was the possession of creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound, in law, to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment. Liens invalid as against creditors at the time of assignment remain invalid. These mortgages were void as against creditors at the time of the assignment, unless they were made valid by the clause of the deed of assignment now under consideration. The validity or invalidity of an alleged lien is a question of law. It does not depend on the will of the grantor in an alleged mortgage. This clause neither validated nor invalidated the mortgage in any respect; nor did it except or assume to except from the operation of the assignment the mortgaged property. The property was assigned subject to the liens upon it, and it is the law, not the dictation or convention

of the parties which determines the validity of the liens, and against whom they exist.

Judgment affirmed.

JOHNSON, C. J., took no part in the decision.

SUBJECT TO WHAT ASSIGNED TAKES.

—As a general proposition, an assignee for the benefit of creditors takes the property subject to all prior equities: *Williams v. Winsor*, 12 R. I. 9; *Moody v. Sitton*, 2 Ired. Eq. 382; *Codwise v. Gelston*, 10 Johns. 507; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Frow v. Doneman*, 11 Ala. 880; *Reed v. Sands*, 37 Barb. 185; *Leger v. Bonaffe*, 2 Id. 475; *Addison v. Burekmyer*, 4 Sandf. Ch. 498; *Stow v. Yarwood*, 20 Ill. 497; *Goodwin v. Mix*, 38 Id. 115; *Griffin v. Marquardt*, 17 N. Y. 28; *Plunkett v. Carew*, 1 Hill Ch. 169; *Roberts v. Corbin*, 26 Iowa 315; *Tharpe v. Dunlap*, 4 Heisk. 674; *Warren v. Fenn*, 28 Barb. 333; *Corn v. Sims*, 3 Metc. (Ky.) 391; *Garrison's Appeal*, 2 Grant Cas. 216; *Stute v. Patten*, 49 Me. 383; *Stockett v. Goodman*, 47 Md. 54; *Seay v. Rome Bank*, 66 Ga. 609; *Zuring v. Cox*, 78 Ky. 527; incumbences: *Corning v. White*, 2 Paige 567; *Walker v. Miller*, 11 Ala. 1067; *Crosby v. Hillyer*, 24 Wend. 280; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Mellon's Appeal*, 32 Penn. St. 121; *Swoyer's Appeal*, 5 Id. 377; *Twelves v. Williams*, 3 Whart. 485; *Wurtz v. Hart*, 13 Iowa 515; *Dimon v. Delmonico*, 35 Barb. 554; *Hogan v. Strayhorn*, 65 N. C. 279; *In re Howe*, 1 Paige Ch. 125; *O'Hara v. Jones*, 46 Ill. 288; *Willis v. Henderson*, 5 Id. 13; and set-offs: *Bank of Harrisburg v. Sherlock*, 16 Bankr. Reg. 62; *Ainslie v. Boynton*, 2 Barb. 258; *Fry v. Boyd*, 3 Gratt. 73; *Wharton v. Hopkins*, 11 Ired. 505; *Haywood v. McNair*, 2 D. & B. 283. But see *McConaughy v. Chambers*, 64 N. C. 284.

Thus, he takes real estate subject to equitable liens for the purchase-money:

Corn v. Sims, 3 Metc. (Ky.) 391; and see *Zaring v. Cox*, 78 Ky. 527; and existing mortgages: *Wurtz v. Hart*, 13 Iowa 515; *Dimon v. Delmonico*, 35 Barb. 554; *Luchenbach v. Brickenstein*, 5 W. & S. 145; judgment liens. See *Crosby v. Hillyer*, 24 Wend. 280. But compare *Mifflin v. Rarey*, 3 Rawle 483; mechanics' liens: *Twelves v. Williams*, 3 Whart. 485; *Murry v. Hutcheson*, 8 Abb. N. Cas. 423; and legacies charged upon it: *Couch v. Delaplaine*, 2 N. Y. 397; *Swoyer's Appeal*, 5 Penn. St. 377. Likewise, he takes deposits in bank subject to any lien which the bank may have on the same: *Beckwith v. Bank*, 3 Whart. 485; goods levied upon subject to the levy: *Crosby v. Hillyer*, 24 Wend. 280; and, as stated, debts and choses in action subject to the right of set-off in the debtor: *Bank of Harrisburg v. Sherlock*; *Ainslie v. Boynton*; *Fry v. Boyd*; *Wharton v. Hopkins*; *Haywood v. McNair*, *supra*.

The owners of subsisting and valid liens on, and equities in, the property assigned, are in no wise affected in their rights by the fact of the assignment. A prior mortgagee, for example, may foreclose his mortgage after the assignment as effectually as if it had not been made; and if the assignee sells the mortgaged property the interest of the mortgagee is transferred to the fund arising from the sale: *Lindermann v. Ingham*, 36 Ohio St. 1.

WHEN EQUITY, LIEN OR SET-OFF MUST HAVE BEEN ACQUIRED. — The equity, lien, or set-off, to be available, must have been acquired prior to the taking effect of the assignment: *Smith v. Brinckerhoff*, 6 N. Y. 305; *Myers v. Davis*, 22 Id. 489; *Martine v. Willis*,

2 E. D. Smith 524; *Bank v. Knox*, 19 Gratt. 739, 747; *Birdwell v. Cain*, 1 Cald. w. (Tenn.) 301; *Brashear v. West*, 7 Pet. 608.

But it has been held that a lien attaching subsequent to the making of the assignment and prior to its acceptance by the trustee has precedence: *Crosby v. Hillyer*, 24 Wend. 280.

A set-off, to be maintainable against the assignee, must have been also due at the time of the assignment: *Wells v. Seaward*, 3 Barb. 40; *Keep v. Lord*, 2 Duer 78; *Lawrence v. Bank*, 3 Rob. 143; *Beckwith v. Bank*, 9 N. Y. 211; *Myers v. Davis*, 22 Id. 489; *Lockwood v. Beckwith*, 6 Mich. 168, 175. *Contra*. *Maas v. Goodman*, 2 Hilt. (N. Y.) 275. And see *Morrow v. Bright*, 20 Mo. 298; *Fry v. Boyd*, 3 Gratt. 73. It is not sufficient that it became due before suit was commenced: *Hicks v. McGrorty*, 2 Duer 295. Or, if a judgment, it must have been obtained before the assignment: *Ogden v. Prentice*, 33 Barb. 160.

A creditor cannot set off his claim against the value of goods purchased at the assignee's sale: *Bateman v. Connor*, 1 Halst. L. 104.

ASSIGNEE NOT A "BONA-FIDE PURCHASER."—It has been attempted to establish the doctrine that an assignee for the benefit of creditors is a "bona fide purchaser" for value within the contemplation of the registry and other acts designed for the protection of such parties, and hence not bound, for instance, by prior equities of which he had no notice at the time of the assignment; but while this view has been entertained by several courts: *Dey v. Dunham*, 2 Johns. Ch. 182; *Wickham v. Martin*, 13 Gratt. 427; *Evans v. Greenhow*, 15 Id. 153; *Exchange Bank v. Knox*, 19 Id. 739; *Hollier v. Lowl*, 2 Mich. 309; *Gates v. Loburne*, 19 Mo. 17. Also see *Wise v. Wimer*, 23 Mo. 237; *Hardcastle v. Fisher*, 24 Id. 70; the prevailing opinion is that unless there be a consideration therefor of some sort at the time, or

some right given up, an assignment for the benefit of creditors will not constitute the assignee nor the creditors *bona fide* purchasers for value within the meaning of such statutes, but they will, so far as such provisions are concerned, take subject to prior and valid equities and liens, whether or not they had notice of them: *Clark v. Flint*, 22 Pick. 231; *Frow v. Dowman*, 11 Ala. 880; *Walker v. Miller*, Id. 1067; *Pierson v. Manning*, 2 Mich. 444; *Knowles v. Lord*, 4 Whart. 500; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Griffin v. Marquardt*, 17 N. Y. 28; *Maas v. Goodman*, 2 Hilt. 275; *Willis v. Henderson*, 5 Ill. 13; *Slade v. Van Vechten*, 11 Paige 21; *Arnold v. Grimes*, 2 Ia. (Clarke) 1; *Wolf v. Eichelberger*, 2 P. & W. (Penn.) 346; *Twelves v. Williams*, 3 Whart. 485; *Vandyke v. Christ*, 7 W. & S. 373; *In re Howe*, 1 Paige Ch. 125; *Leger v. Bonaffee*, 2 Barb. 475; *Taylor v. Baldwin*, 10 Id. 637; *Sieman v. Austin*, 33 Id. 20; *Reed v. Sands*, 37 Barb. 185; *Schieffelin v. Hawkins*, 14 Abb. Pr. 118; s. c. 1 Daly 294; *Ray v. Birdseye*, 2 Denio 626; *Wood v. Robinson*, 22 N. Y. 567; *Van Waggoner v. Moses*, 26 N. J. L. 570; *Bridgford v. Barbour*, 80 Ky. 529.

LIEN VOID AS TO CREDITORS.—The doctrine of the principal case expressed in the first paragraph of the syllabus, namely, that "a mortgage void as to creditors [by reason of some inherent defect or a failure to file or have recorded] is void as against an assignee for the benefit of creditors," is not uncontroverted. Indeed, although it is supported by the former decision of the same court in *Hanes v. Tiffany*, therein cited, and decisions elsewhere: *Building Association v. Willson*, 41 Md. 506; *Swift v. Thompson*, 9 Conn. 63; *Rood v. Welch*, 28 Id. 157; *In re Leland*, 10 Blatch. 503; *Barker v. Smith*, 12 Bank. Reg. 474, it is contradicted by decisions of courts of very high authority: *Vanheusen v. Radcliff*, 17 N. Y. 580; *Mellon's Appeal*, 32 Penn. St. 121; *Luckenbach*

v. *Brickstein*, 5 W. & S. 145; *Wakeman v. Barrows*, 41 Mich. 363; and consult *Williams v. Winsor*, 12 R. I. 9; *Lockwood v. Slewin*, 26 Ind. 124; *Dorsey v. Smithson*, 6 Harr. & Johns. 61. These different decisions proceed upon different theories as to the position of the assignee and the relation he sustains to the several parties interested in the assignment. The one class consider him as the representative of the creditors, and possessing, in such capacity, the most of their rights and powers; the other, treat him as the representative of the assignor, and subject, in his rights and powers, to all things to which the assignor himself was subject. Thus, in the principal case, as has been observed, the judge delivering the opinion of the court, said: "By the assignment the rights of creditors passed to the assignee as matter of law. The possession of the assignee was the possession of creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound, in law, to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment," while in *Mellon's Appeal*, *supra*, it was said that "the assignee is the representative of the assignor, and is affected by all the equities which existed against the property in the hands of his assignor, enjoying his rights, and no others, except that the property is protected from execution in

his hands. He is in no sense the representative of the creditors, and, therefore cannot take to himself any of their rights."

CONVEYANCE FRAUDULENT AND VOID AS TO CREDITORS.—The authorities are in like dispute as to the power of the assignee to take advantage of the common statutory provision that conveyances (including mortgages) in fraud of creditors shall be void; some holding that he has this power: *Pillsbury v. Kingon*, 33 N. J. Eq. 287; s. c. 30 Am. Rep. 556; *Hallowell v. Bayliss*, 10 Ohio St. 537; *Waters v. Dashiell*, 1 Md. 455. See also *Freeland v. Freeland*, 102 Mass. 475; *Shipman v. Etna Ins. Co.*, 29 Conn. 245; *Shirle v. Long*, 6 Rand. 735; while others hold that he has not: *House v. Cremer*, 13 Neb. 298; *Heinrichs v. Woods*, 7 Mo. App. 236; *Sereno v. Pitot*, 6 Cranch 332; *Estabrook v. Messersmith*, 18 Wis. 572; *Browning v. Hart*, 6 Barb. 91; *Leach v. Kilsey*, 7 Id. 466; *Maulers v. Culvers*, 1 Dier. 164; *Carr v. Gale*, 3 Woodb. & M. 68; *Flower v. Cornish*, 25 Minn. 473; *Hahn v. Salmon*, 20 Fed. Rep. 801.

WHEN LIENHOLDER ENTITLED TO DIVIDEND.—A creditor who has a claim secured by a lien is entitled to a dividend from the assignee only on such residue of his claim as may remain unpaid after he has exhausted the property subject to his lien: *Re Knowles*, 13 R. I. 90; *Wurtz v. Hart*, 13 Iowa 515.

L. K. MERRILL.

Akron, Ohio.

Supreme Court of Nebraska.

STATE EX REL. WEBSTER v. NEBRASKA TELEPHONE CO.

Where a corporation or person assumes and undertakes to supply a public demand, made necessary by the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination.

Telephone companies being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the tele-

phone; and where no good reason is assigned for a refusal by a telephone company to furnish a telephone instrument to a person who desires to become a subscriber and tenders a full compliance with all the rules established for other subscribers, a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.

Respondent is the owner of and is conducting a system of public telephone exchanges in Nebraska and Iowa, including in its circuit about fifteen hundred telephone instruments, supplied by it to that number of subscribers, upon the terms fixed by itself. Relator applied to be admitted as a subscriber and was refused. He tendered a full compliance with all the rules of the company. His place of business was accessible, no reason being shown why his request should not be granted. On an application for a mandamus: *Held*, that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand must supply to all alike, without discrimination; and that, having undertaken to supply the demand, in the city of L., wherein relator resided, and being fully able to furnish him with a telephone instrument, the same as its other subscribers, it was his duty to do so.

APPLICATION for mandamus. The facts of the case are sufficiently stated in the opinion.

J. R. Webster, for relator.

R. S. Hall, for respondent.

The opinion of the court was delivered by

REESE, J.—This is an original application for a mandamus to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice. It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln, and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber, and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent

from any obligation to furnish the telephone, even if such obligation would otherwise exist. We cannot see that the relation of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by an action for the amount due. If the telephone has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either or perhaps both of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.

The pleadings and proofs show that the relator is an attorney at law in Lincoln, Nebraska; that he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in southeastern Nebraska; that this territory is occupied by respondent exclusively, together with a large portion of southwestern Iowa, including in all about fifteen hundred different instruments. By the testimony of one of the principal witnesses for respondent, we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the state, and in some matters has no higher or greater rights than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying.

It is also true that the respondent is not possessed of any special privileges under the statutes of the state, and that it is not under quite so heavy obligations, legally, to the public as it would be,

had it been favored in that way. But we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business, gives it a monopoly of the business which it transacts. No two companies will try to cover the same territory. The demands of the commerce of the present day make the telephone a necessity. All people, upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of the new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things, no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce, so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist, in many cases, sufficient reason for failing to comply with such a demand; but they are not shown to exist in this case. It is known to be essential to the business interests of relator that his office be furnished with a telephone. The value of such property is, of course, conceded by respondent; but, by its attitude, it says it will destroy those interests, and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there; that, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations; that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public

demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate,—the demand which it proposes to supply. It has so assumed and undertaken to the public. That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use, and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. It has and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike, who are alike situated, and not discriminate in favor of nor against any. This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention, and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce, nor to the particular kind of service known or in use at the time when these principles were enunciated, "but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to

the telephone, "as these new agencies are successfully brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they related, at all times and under all circumstances:" *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 9.

In *State v. Bell Telephone Co.*, 36 Ohio St. 296, a writ of mandamus was granted by the Supreme Court of Ohio to compel the telephone company to place one of its telephone instruments in the place of business of the relator, and to give it equal facilities with other telegraph companies. This decision was based upon the statute of that state which provided that telegraph companies should receive dispatches from and for other telegraph companies' lines, and from and for individuals, and transmit them with impartiality and good faith, under a penalty of one hundred dollars, and that the provisions of the act should apply also to telephone companies. So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty) they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute; and the same is true of the clause in the act making its provisions applicable to telephones. See authorities cited in the brief of relator in that case. But the court declines discussing that question, as the question between the parties could be determined by reference to the statute. In *Allnut v. Inglis*, 12 East 527, the Court of King's Bench, in England, in 1810, held that "where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest conferred for their benefit." In *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33, the Supreme Court of Illinois held that it was the duty of a railroad company to make a personal delivery of consigned property to the consignee, in cases where such delivery was practicable, and that the duty existed independent of the statute, and it was within the power of the court to enforce the observance of such duty. See, also, *People v. Manhattan Gas-light Co.*, 45 Barb. 136; *Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365; *Munn v. Illinois*, 94 U. S. 113.

It is insisted by the respondent that mandamus is not the proper remedy in this case; that if the obligations contended for by the

relator do exist, they are not enforceable by mandamus. To this we cannot agree. To our mind it is the duty of respondent to furnish the transmitter and telephone to the relator as it does to its other subscribers, without discrimination; that this duty arises from the trust or station assumed by respondent, and that relator has no adequate remedy at law. The duty is of the same nature as the duties of common carriers. Respondent is a common carrier of news, the same as a telegraph company. The duty of common carriers is one of law, growing out of their office, and not of contract: *Redf. Carr.*, p. 30, § 40; *Western Transp. Co. v. Newhall*, 24 Ill. 466. The remedy by mandamus is the appropriate one. The duty is of a public character, and there is no other adequate mode of relief: *Vincent v. Chicago & A. R. Co.*, *supra*; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *People v. Albany & V. R. Co.*, 24 N. Y. 261; 2 Shelf. Railw. 864; *Moses, Mand.* 155, 168, 171, 176; 2 Redf. Railw. 257, 275, 294; *Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365; *State v. Bell Telephone Co.*, *supra*.

A peremptory writ of mandamus must be allowed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF ILLINOIS.³

SUPREME COURT OF KANSAS.⁴

SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁵

ACTION.

Conspiracy to Prevent the Collection of a Special Tax.—The plaintiff obtained a judgment against a county and obtained a mandamus thereon commanding the levy and collection of a special tax. In obedience to this and other like writs the County Court levied a special "judgment tax." Defendants and their confederates conspired to prevent the collection of this tax, and, by assembling in great numbers and by threats

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 113 U. S. Rep.

² From B. D. Turner, Esq., Reporter; to appear in 43 Ark. Rep.

³ From Hon. N. L. Freeman, Reporter; to appear in 111 Ill. Rep.

⁴ From A. M. T. Randolph, Esq., Reporter; to appear in 33 Kans. Rep.

⁵ From John Lathrop, Esq., Reporter; to appear in 137 Mass. Rep.

and hostile demonstrations, prevented any bidding at an advertised sale of horses and mules levied upon by the collector, and overawed and intimidated the taxpayers of the county so that they did not pay the tax. *Held*, on demurrer, that plaintiff had a right of action against the defendants: *Findlay v. McAllister*, S. C. U. S., Oct. Term 1884.

Foreign Administrator—Action for Tort.—An administrator appointed in another state cannot maintain an action in this state, where the law of the state from whence he derives his appointment prohibits him from instituting, maintaining or prosecuting an action in his own state for damages resulting from the wrongful act or omission of another in causing the death of his intestate: *Limekiller v. Hannibal & St. J. Railroad Co.*, 33 Kas.

Kansas Pacific Railway Co. v. Lydia H. Sutter, 16 Kas. 568, referred to and distinguished; *Perry, as administrator, etc., v. St. Joseph & Western Railway Co.*, 29 Kas. 420, referred to and commented upon: *Id.*

What constitutes Loan—Right of Action.—If A. borrows money for B., the payment of which is secured to the lender by a transfer of stock furnished by B., to whom the money so borrowed is paid by A., this does not constitute a loan by A. to B., to recover which A. can maintain an action against B., before A. has repaid the money which he borrowed, or has sustained some loss: *Reeve v. Dennett*, 137 Mass.

ASSIGNMENT. See *Bills and Notes*.

Validity in other State.—An assignment of property, executed in another state, by a debtor domiciled there, for the benefit of his creditors, which provides that certain creditors shall be paid in full before the others are paid anything, and which is assented to by creditors holding claims exceeding in amount the value of the property assigned, if valid by the law of that state, will be upheld in this commonwealth, as against an attaching creditor of the assignor domiciled here: *Train v. Kendall*, 137 Mass.

ATTACHMENT. See *Assignment*.

Residence.—"Residence," in the attachment laws generally, implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return at some time to the true domicile. An actual resident in this state, having a domicile in another, cannot be attached here as a non-resident: *Krone v. Cooper*, 43 Ark.

"Domicile is of broader meaning than residence." It includes residence: but actual residence is not indispensable to retain a domicile after it is once acquired. It is retained by the mere intention not to change it: *Id.*

ATTORNEY.

Unauthorized Release of Judgment.—A release of a judgment was entered upon the appearance docket by a person who signed the release as "attorney of record," but he was not an attorney of the judgment-creditor, and had no authority from the judgment-creditor to enter such release, and the judgment had never been paid or satisfied. *Held*, that

the release was void : 1st. Because the person entering the release had no authority therefor from the judgment-creditor. And 2d. Because an attorney at law has no power, except by special authority from his client, to release his client's judgment where the judgment has not been paid or satisfied : *Rounsaville v. Hazen*, 33 Kas.

BILLS AND NOTES.

Bill of Exchange—Payable out of Particular Fund.—A draft for a certain sum, drawn by one person upon another, payable at sight to the order of a bank named, and containing the direction to charge the same to a certain account, is a negotiable bill of exchange, not payable out of a particular fund, and does not constitute an assignment of the fund : *Whitney v. Eliot Nat. Bank*, 137 Mass.

BURGLARY. See *Criminal Law*.

COMMON CARRIER.

Special Contract limiting Liability.—A stipulation in a shipping contract, voluntarily and understandingly entered into by a shipper of live stock for transportation, that in consideration of a reduced rate no claim for damages accruing to the shipper shall be allowed or paid by the carrier, or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the carrier, at his office, within five days from the time such stock is removed from the cars, will be binding upon the shipper, and is not void as being contrary to any law or to public policy : *Black v. Wabash, St. L. and Pac. Railway Co.*, 111 Ill.

Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself of the nature of its contents, he will nevertheless be bound by it, for the reason the law will not permit him to allege, as a matter of defence, his ignorance of that which it was his duty to know, particularly when the means of information are within his immediate reach, and he neglects to avail himself of them : *Id.*

Negligence—Making up Train—Ownership of Cars by different Companies.—If a railway company receives a passenger in one of its cars for passage before making up the train of which such car is to be a part, the law requires the company to make up its train, couple, manage and control its cars and engines, in such a careful, skilful and prudent manner as to carry the passenger with reasonable safety, and it will be liable for an injury to the passenger resulting from its neglect of this duty, when such passenger is not wanting in ordinary care : *Liannibal and St. J. Railroad Co v. Martin*, 111 Ill.

Where a passenger in a railway coach which was overcrowded, was informed, by the announcement of the conductor in charge, that another car had been added in front, and the adding of the car had been felt when it was pushed back, and it was found in proper position for the reception of passengers, though in fact not securely coupled, so that just as such passenger was in the act of stepping from the platform of the rear coach to the forward one, the latter moved forward suddenly,

causing him to fall to the ground, whereby he received a serious injury, it was *held*, that the passenger had the right to assume he could pass from the one car to the other with safety, and in so attempting was not chargeable with want of ordinary care: *Id.*

Where the trains of a railway corporation are made up by the employees of another railroad company, and on the track of the latter, and cars used to make up the same belong to other companies, if the use of the cars and tracks and labor in making up such trains is to enable such first-named corporation to exercise its function and perform its duty as common carrier, such cars, tracks and servants, so far as the rights of its passengers who may receive an injury are concerned, must be regarded as the cars, tracks and servants of the company so using the same: *Id.*

Railroads—Limited Tickets—Obligations of Purchaser and Carrier—Continuous Journey—Ejection of Passenger—Damages.—A passenger on a limited railroad ticket is bound to use it within the time specified in the ticket, and to observe the reasonable regulations of the carrier for the running of trains and for facilitating the business of the carriage of passengers; and the company is bound to afford him the opportunity to do so, by running its trains within the time; and if in this it fail, though the last day be a Sunday, it cannot refuse the ticket afterwards, at least when offered on the first train after the expiration of the time. *L. R. and F. S. Railway v. Dean*, 43 Ark.

A purchaser of a limited ticket over several connecting lines of railroads is not bound to make a continuous journey over all, but is bound to make it continuous over each coupon of the ticket; and over the last within the time limited: *Id.*

A limited railroad ticket over several connecting lines expired on Sunday; the last line ran no train on that day, and the passenger offered the ticket on the train the next day. It was refused, and the passenger, under protest and under threat of ejection by the conductor, paid his fare to a further station, and there, for want of money, was put off, and walked to his destination. *Held*, that the extra fare paid, the humiliation of being put off the train, and the inconvenience of reaching his destination by walking, were proper elements of damage to be considered by the jury: *Id.*

Ejection of Passenger—Liability of Company.—If the ticket seller of a railroad corporation delivers to a passenger a ticket with a hole punched in it, and assures him that the ticket entitles him to be carried to his place of destination, when in fact, by the rules of the corporation, it does not, and the passenger is expelled by the conductor from the train of cars, for refusing to pay additional fare, he may maintain an action therefor against the corporation: *Murdock v. Boston & Albany Railroad Co.*, 137 Mass.

CONFLICT OF LAWS. See *Action; Assignment.*

CONSPIRACY. See *Action.*

CONSTITUTIONAL LAW.

Regulation of Commerce—Navigable Waters—Power of a State over.—The commercial power of Congress is exclusive of state authority only

when the subjects upon which it is exerted are national in character: when they are local in their nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until Congress intervenes and supersedes their action: *Cardwell v. American Bridge Co.*, S. C. U. S., Oct. Term 1884.

The clause in the act of September 9, 1850, admitting California as a state into the Union, which declares "that all the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor," does not lessen the power over such navigable waters which the state would have if the clause had no existence; notwithstanding it, the state can authorize the construction of bridges over navigable streams whenever they would promote the convenience of the public: *Id.*

Escanaba Co. v. Chicago, 107 U. S. 678, commented on: *Id.*

Eminent Domain—What is not a Public Use.—The general grant of legislative power in the constitution of a state does not authorize the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property without the owner's consent, for any but a public object; as by authorizing a city to issue its bonds by way of donation to a private manufacturing corporation: *Cole v. La Grange*, S. C. U. S., Oct. Term 1884.

Deprivation of Property without due Process of Law—Eminent Domain—General Mill Act.—A statute of a state, authorizing any person to erect and maintain on his own land a water-mill and mill-dam upon and across any stream not navigable, paying to the owners of lands overflowed, damages assessed in a judicial proceeding, does not deprive them of their property without due process of law, in violation of the fourteenth amendment of the constitution of the United States: *Head v. Amoskeag Manufacturing Co.*, S. C. U. S., Oct. Term 1884.

Whether the erection and maintenance of mills for manufacturing purposes under such a statute can be upheld as a taking, by delegation, of the right of eminent domain, of private property for public use, not decided; but, *held*, that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature: *Id.*

Act not Embracing more than one Subject.—An act of the legislature of Iowa, entitled "an act to authorize independent school-districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school-houses; legalizing bonds heretofore issued, and making school-orders draw six per cent. interest in certain cases," is not in violation of the provision in the constitution of that state which declares that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title:" *Ackley School District v. Hall*, S. C. U. S., Oct. Term 1884.

Liquor—Traffic is controlled by the Legislature.—In the absence of constitutional restraints, the regulation of the traffic in liquors is wholly within legislative control. The legislature may entirely prohibit it, or

empower municipal corporations to do so within their limits. But neither counties, cities nor towns can impose a tax upon the privilege not authorized by the legislature: *Drew County v. Bennett*, 43 Ark.

Healing Acts—Change of Law pending Suit.—The legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights: *Green v. Abraham*, 43 Ark.

The rule in regard to healing acts is this: if the thing omitted or failed to be done, and which constitutes the defect in the proceedings, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. And if the irregularity consists in doing some act, or in the mode or manner of doing it, which the legislature might have made immaterial by a prior law, it may do so by a subsequent one: *Id.*

The bringing of a suit vests in a party no right to a particular decision. His case must be determined on the law as it stands at the time of the judgment—not at the bringing of the suit; and if pending an appeal the law is changed, the appellate court must determine the case under the law in force at the time of its decision: *Id.*

Special Legislation—Municipal Corporations—Exemption from Costs.

—An act allowing municipal corporations to appeal without giving an appeal bond, as in other cases, is not unconstitutional, as being either a local law or special legislation: *Holmes v. Mattoon*, 111 Ill.

Public municipalities, such as counties, cities, villages, towns and school districts, and all officers suing for or defending the rights of the state, or acting for or instead of the state in respect of public rights, being only instrumentalities of the state, may constitutionally be authorized to sue without the payment of costs, or conforming to all the requirements imposed by the law upon natural persons or corporations formed for private gain: *Id.*

CORPORATION. See Receiver.

Expulsion—By-Law—Special Meeting.—A by-law of a religious society provided as follows: "Any member who shall either cease to regularly worship with the society, or who shall fail to contribute to the support of its public worship for the term of one year, shall have his or her name dropped from the list of members." *Held*, that a member could be deprived of his membership only by a vote of the society, after a hearing: *Gray v. Christian Society*, 137 Mass.

A by-law of a religious society provided that the object for which a special meeting was called must be stated. Another by-law provided that a new member must be approved by a vote of the society. The warrant which called a special meeting of the society, at which several persons were admitted to membership and allowed to vote, contained no article for the admission of new members, but contained the general article, "To transact any other business that may legally come before said meeting." *Held*, that the election of such persons was invalid: *Id.*

CRIMINAL LAW.

Evidence—Accomplice.—The confession of a prisoner accompanied with proof that the offence was actually committed by some one, will warrant his conviction: *Melton v. State*, 43 Ark.

A defendant cannot be convicted of a crime upon the testimony of a partaker in the crime, whether his guilt be in the same degree or not, unless corroborated by evidence tending to connect the defendant with the commission of the offence; the corroboration is not sufficient if it merely prove the *corpus delicti* and the circumstances thereof, and one accomplice cannot corroborate the testimony of another: *Id.*

Reversal of Judgment—Verdict against the Evidence.—This court will reverse a judgment of conviction, in a case of felony, where the evidence on which it is based is all circumstantial and of an unsatisfactory character, and which, when all considered, leaves a serious and grave doubt of the guilt of the defendant: *Mooney v. People*, 111 Ill.

While this court recognises the rule that jurors are judges of the facts and the weight of evidence in all criminal cases, yet the law has imposed upon the court the solemn and responsible duty to see that no injustice has been done by hasty action, passion or prejudice, or from any other cause, on the part of the jury: *Id.*

Burglary—What constitutes Breaking.—The lifting of a latch of a closed door, and the pushing open of the door, with the intent expressed in the statute, is a sufficient breaking within the meaning of the law, to constitute burglary: *State of Kansas v. Groning*, 33 Kas.

Where a defendant was charged with burglary, under sec. 68 of the crimes act, and it was shown upon the trial that the outside door of the building or granary, which it was alleged the defendant broke and entered in the night time, was closed and latched a few hours before the crime was committed, and the next morning was found open, and certain oats and rye taken. *Held*, that the jury was justified in finding, upon this evidence, that there was an actual breaking and entry into the building, within the meaning of the law: *Id.*

In Jeopardy—Discharge of Juror.—A prisoner is in jeopardy from the time that the jury is impanelled and sworn in a court of competent jurisdiction upon an indictment sufficient in form and substance to sustain a conviction; and the entry of a *nolle prosequi*, or discharge of a juror, after that, without his consent, operates as an acquittal, except in cases of overruling necessity, as the death or illness of the judge or a juror, or inability of the jury to agree on a verdict: *Whitmore v. State*, 43 Ark.

DAMAGES. See *Common Carrier*.

DIVORCE. See *Husband and Wife*.

ERRORS AND APPEALS. See *Criminal Law*.

Evidence—Res Gestæ.—In prosecutions for assault words uttered during the continuance of the main transaction or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself and if they are relevant may be proved as any other fact, without calling the party who uttered them: *Flynn v. State*, 43 Ark.

ESCAPE.

Voluntary Escape—Whether a Discharge from Imprisonment.—The ancient rule that a debtor in execution, by a voluntary escape became

discharged both from imprisonment and the debt, leaving the creditor to look to the sheriff alone for his debt, is no longer in force, and upon such escape he may be lawfully re-arrested and imprisoned: *The People v. Hanchett*, 111 Ill.

Where a debtor has been legally arrested by a sheriff under a *ca. sa.* running in the name of the people, and is enlarged on bond for his appearance on the day set for the hearing of his application for a discharge, the court, on refusing a discharge, may order him back into the officer's custody without process in the name of the people, and this may be verbally done: *Id.*

EVIDENCE. See *Criminal Law*.

EXECUTORS AND ADMINISTRATORS. See *Action*.

EXECUTION.

Exemption—Time—Assignment without Claim—Mortgaged Property.

—A merchant tailor, who is the head of a family and a resident of the state, is entitled to an exemption of such portion of his stock in trade as he may select up to the statutory limit of value; and this right is absolute, and does not depend upon any claim or selection to be made by him: *Rice v. Nolan*, 33 Kas.

The mere failure of the debtor to claim his exemption until the morning preceding a sale made by an officer upon an order of attachment does not operate as a waiver of such right: *Id.*

Where the stock in trade of a debtor, some of which is exempt, is mortgaged, he cannot be compelled to accept as his exemption that which is subject to the mortgage at its full value, but he is entitled to an exemption of his own selection, free of all liability from debt, up to the full value of \$400: *Id.*

Where the exempt property of the defendant has been levied on by attachment, and a few days before the sale thereof the defendant makes an assignment for the benefit of his creditors, with no reservation of the exempt property so levied on, but no other or further proceedings are taken under such assignment, and where the plaintiffs do not claim the property thereunder and are not influenced or prejudiced thereby, the defendant is not estopped as against such plaintiffs from thereafter claiming the attached property as exempt from sale under such attachment process: *Id.*

EXEMPTION. See *Execution*.

FRAUD.

Fraudulent Representations—Who may sue for.—It is not necessary to support an action for false representation, that the representation be addressed directly to the plaintiff. If it be made with the intent to influence every person to whom it may be communicated, or who may read or hear of it, it is sufficient. Nor is it essential to the right of action that the misrepresentation be the sole inducement to a purchase: *Carrill v. Jacks*, 43 Ark.

Negligence in Signing a Contract without Reading it.—In an action upon a written contract, which the defendant sought to avoid on the ground of an alleged fraudulent statement that it was a copy of an original draft except in a matter which did not concern him, the court,

at the instance of the plaintiff, instructed the jury that a party executing a written contract should exercise reasonable care and prudence to learn its nature and contents before signing it, by reading the same, if capable of reading, and that he would not be excused for his want of care and prudence in signing without so reading the same, unless induced to do so by wilfully false statements of the party procuring his signature. *Held*, that the use of the word "wilfully," in the connection it was employed, did not render the instruction erroneous: *Livingston v. Strickland*, 111 Ill.

What is negligence in signing a contract without reading the same is not a question of law, but one of fact for the jury, to be judged of from the peculiar facts and circumstances of each case. In such a case it is not proper to select certain of the facts, and tell the jury in an instruction that they afford no evidence of negligence or a want of proper care: *Id.*

HUSBAND AND WIFE.

Divorce—Extreme Cruelty.—Any unjustifiable conduct on the part of the husband which so grievously wounds the mental feelings of the wife, or so utterly destroys her peace of mind as to seriously impair her bodily health or endanger her life, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty, although no physical or personal violence is inflicted or even threatened: *Avery v. Avery*, 33 Kas.

INTEREST. See *Usury*.

INTOXICATING LIQUOR. See *Constitutional Law*.

LIEN. See *Shipping*.

MANDAMUS.

Railroad Company—Construction of Bridge.—Where a duty is imposed upon a railroad company to construct a viaduct over its railroad track, and where the same cross a public street in a city, mandamus will ordinarily lie to compel the railroad company to so construct such viaduct: *St. Louis v. Mo. Pac. Railroad Co.*, 33 Kas.

And the action may in some cases be prosecuted in the name of the state by the county attorney: *Id.*

MASTER AND SERVANT.

Liability of Master for Injury to Servant caused by Defective Materials.—In an action by a workman against his employer, for personal injuries caused by the fall of a staging upon which he was at work, it is in dispute whether the defendant undertook to furnish the staging completely, or whether he undertook merely to provide, and to provide, a quantity of staging materials from which fellow servants of the workman erected the staging. The judge instructed the jury that the master is liable to his servant for injuries resulting from defective materials negligently furnished by him, although the negligence of the fellow-servant contributes to the accident; and, on the question whether the obligation of the master extended to the furnishing of the staging, the jury were to find for the master if they believed that he had

as a completed structure, read the instructions requested by each party. and instructed the jury, that, if the plaintiff's theory was correct, the instructions he asked for were law; and that, if the defendant's theory was correct, the instructions he asked for were law. *Held*, that the plaintiff had no ground of exception: *Clark v. Soule*, 137 Mass.

Who are Fellow-Servants.—A person in the employ of a railway corporation as a head blacksmith, was with a number of other employees, directed to proceed on a wrecking train of the company to a place where a train of cars had been wrecked, for the purpose of assisting in removing the rubbish and obstructions. The train carrying them was under the charge of the engineer, who acted also as conductor, and by his neglect to obey instructions the train collided with another, resulting in the death of the blacksmith. *Held*, that the blacksmith, and all the other employees on the train, including the engineer and fireman, were fellow-servants of a common master, engaged in the same line of employment, within the rule excluding a right of recovery by one servant for the negligence of a fellow-servant: *Abend v. Terre Haute & Indianapolis Railroad Co.*, 111 Ill.

Injury to Employee—Defective Machinery.—A railroad corporation is liable to one of its employees for an injury occasioned to him by being struck by a bridge-guard, if the guard is out of its proper position, and this is caused by the wearing out of the rope attached to the guard, and the corporation has not made suitable provision to have notice of, and to remedy, defects liable to be occasioned by its use: *Warden v. Old Colony R. R.*, 137 Mass.

MUNICIPAL CORPORATION. See *Constitutional Law*; *Taxation*.

Bond of, when a Negotiable Security—Right of Holder to Sue in United States Courts.—A municipal bond issued under the authority of law for the payment, at all events, to a named person or order, a fixed sum of money at a designated time therein limited, being endorsed in blank, is a negotiable security within the law-merchant: *Ackley School District v. Hall*, S. C. U. S., Oct. Term 1884.

Its negotiability is not affected by a provision of the statute, under which it was issued that it should be "payable at the pleasure of the district at any time before due:" *Id.*

Consistently with the act of March 3, 1875, determining the jurisdiction of the circuit courts of the United States, the holder may sue therein without reference to the citizenship of any prior holder, and unaffected by the circumstance that the municipality may be entitled to make a defence based upon equities between the original parties: *Id.*

NEGLIGENCE. See *Common Carrier*; *Fraud*; *Master and Servant*.

Contributory Negligence—What constitutes.—Where an employee of a railroad company was sent on a wrecking train to assist in removing the debris of a wrecked train from the track, and instead of taking his seat in the car, in violation of a published rule of long standing entered the locomotive and took a seat with the fireman, just in front of the latter, where he remained until a collision took place with a freight train, and he was killed, it was held, that he was guilty of such negligence in

taking an extra-hazardous place, as to bar any right of action by personal representative, notwithstanding the negligence of the servant in charge of the train: *Abend v. Terre Haute and Indianapolis Railroad Co.*, 111 Ill.

It is not true, as a general proposition, that in actions for personal injuries caused by the defendant's negligence, the contributory negligence of the injured party will constitute no defence except when the latter's negligence is an element or factor in producing the force causing the injury complained of. It is sufficient if his negligence materially contributes to the injury, whether it contributes to the force causing the injury or not: *Id.*

A person who voluntarily and unnecessarily places himself in a well known place of danger to life or body, but for which position he could not have been injured, and he is injured or killed in consequence of such exposure, even through gross negligence of the defendant, if the act of the latter is not wanton or wilful, is guilty of such contributory negligence as to preclude any recovery by him or his personal representative: *Id.*

PATENT.

What constitutes Invention.—Novelty and increased utility do not necessarily constitute invention: *Hollister v. Benedict Manufacturing Company*, S. C. U. S., Oct. Term 1884.

That which is but the display of the expected skill of the maker in calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice, is in no sense a creative work of that inventive faculty which it is the purpose of the constitution and the patent laws to encourage and reward: *Id.*

Expiration of Patent during Pendency of Suit—Practice.—Suits in equity having been begun, in 1879, for the infringement of two patents, and the Circuit Court having dismissed the bills, the Supreme Court of the United States, in reversing the decrees, after the first patent had expired, but not the second, awarded accounts of profits and damages as to both patents, and a perpetual injunction as to the second patent: *Consolidated Valve Co. v. Crosby Valve Co.*, S. C. U. S., Oct. Term 1884.

RAILROAD. See *Common Carrier*.

RECEIVER.

Of Corporation—May be appointed before Court acquires Jurisdiction over Corporation—Real Estate.—The court may, on a proper showing, appoint a receiver to take charge of the assets of an insolvent corporation, to save the same from destruction or waste, before acquiring jurisdiction to adjudicate upon the rights of such corporation. In such case the receiver may be authorized to hold the property until the rights of the parties are determined. Placing property in the hands of a receiver is in the nature of an equitable attachment, whereby the court, through its officer, acquires the custody of such property: *St. Louis*

and Sandoval Coal and Mining Co. v. The Sandoval Coal and Mining Co., 111 Ill.

In the absence of any statutory provisions on the subject, real estate cannot be vested in the receiver, except by a conveyance to him : *Id.*

REMOVAL OF CAUSES.

Proceeding against an Administrator—Removals on the Ground of Prejudice or Local Influence.—A proceeding in a state court against an administrator, to obtain payment of a debt due by the decedent in his lifetime, is removable into a court of the United States when the creditor and the administrator are citizens of different states, notwithstanding the state statute may enact that such claims can only be established in a probate court of the state, or by appeal from that court to some other state court : *Hess v. Reynolds*, S. C. U. S., Oct. Term 1884.

The act of March 3, 1875, to determine the jurisdiction of the circuit courts, and regulate the removal of causes from state courts, does not repeal or supersede all other statutes on those subjects, but only such as are in conflict with the latter statute. The third clause of section 639 of the Revised Statutes (authorizing removals on the ground of prejudice or local influence), is not therefore abrogated or repealed : *Id.*

An application for removal under that clause is in time, if made before the trial or final hearing of the cause in the state court : *Id.*

SHIPPING.

Lien for Construction.—If the hull and spars of a vessel are completed at one port, and sufficient rigging is put on her, and a sufficient cargo for the necessary ballast is taken, to enable her to go to another port, where materials necessary to the rigging and equipment of a vessel, and the first put upon her, are procured, the materials so furnished at the latter port are furnished in the "construction" of the vessel : *McDonald v. The Nimbus*, 137 Mass.

STATUTE. See *Constitutional Law*.

TAXATION.

Construction of Sewer—Assessment—Notice—What Property liable.—Where sewers are constructed under authority of a city, and afterwards special taxes are levied upon the adjacent property owners to pay for the same, only those individuals who can use such sewers should be taxed specially to pay for their construction or maintenance, and each should be taxed specially only for the amount of the special benefits which the sewers might confer upon him, and each should be taxed specially precisely in proportion to the benefits which he might individually receive : *Gilmore v. Hentig*, 33 Kas.

Also in such cases, before special taxes can be made a fixed and permanent charge upon the property of such individuals they must have notice, with an opportunity to be heard, and an opportunity to contest the validity and fairness of such taxes : *Id.*

It is not necessary, however, in any case that the notice should be personally served upon the property owner, or that the proceeding should be a judicial proceeding, or that the notice should be given before the taxes are levied ; but any notice that will enable the property owner to

procure a hearing before some officer, board or tribunal, and to contest the validity and fairness of the taxes assessed against him, before the same shall become a fixed and established charge upon his property, will be sufficient: *Id.*

TRESPASS.

License from Life-tenant—Entry under License of Tenant for Life.—The entry upon premises by a railway company, and the construction of a railroad over the same, which is no injury to the inheritance, under the verbal license of the tenant for life, is not a trespass or an unlawful entry. Such entry will not subject the party so entering to either an action of trespass or ejectment on the part of the remainder-man: *The Chicago and Alton Railroad Co. v. Goodwin*, 111 Ill.

TRIAL.

Sealed Verdict—Not final until recorded.—The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final, but remains within the control of the jury, and is subject to any alteration or amendment by the jurors until it is actually rendered in court and recorded, and up to that time any member of the jury is at liberty to withdraw his consent from a verdict previously agreed upon: *Bishop v. Mugler*, 33 Kas.

A sealed verdict should be presented by the full jury in open court so that the parties may avail themselves of the right of polling the jury and until the verdict is regularly received and filed it is without force or validity: *Id.*

UNITED STATES COURTS. See *Municipal Corporation*.

USURY.

Who may avail of the Defence.—A party not injuriously affected by an usurious transaction, is not allowed to complain or take advantage of the usury. So if a party sells land subject to a mortgage thereon, which is given to secure a debt, with usury reserved, and the purchaser assumes the payment of the debt as a part of the purchase-money, such purchaser or those claiming under him, cannot interpose the defence of usury to a bill to foreclose the mortgage: *Stiger v. Bent*, 111 Ill.

VERDICT. See *Trial*.

WILL.

Construction—Heirs.—A testator, after giving several legacies by his will, directed that the residue of his property should "be equally divided among my brothers and sisters and their heirs." When the will was made, and at the testator's death, there were living three brothers, one sister, and children and grandchildren of two deceased sisters. The testator knew of the decease of his two sisters, and of the existence of their issue. *Held*, that the testator intended that the heirs of his deceased sisters should take, by right of representation, equally with his surviving brothers and sister: *Huntress v. Place*, 137 Mass.

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VALIDITY OF CONTRACTS IN RESTRAINT OF TRADE.

(Concluded from April Number.)

V. CLASSIFICATION.—Chief Justice PARKER (*Mitchel v. Reynolds*, 1 P. Wms. 181), divides contracts in restraint of trade into two classes, namely: involuntary and voluntary; the former restraints arising from, first, grants or charters from the crown; second, customs; and third, by-laws; and the latter comprising those restraints which arise from the agreement of the parties. Only voluntary restraints will be treated in this article. Voluntary restraints are sub-divided into, first, general, and second, particular or limited restraints, which sub-division will be followed.

VI. GENERAL RESTRAINTS.

(a) *Criterion of Validity*.—It is exceedingly difficult to lay down a general rule to cover all classes of cases. Each contract must rest upon its own peculiar circumstances. The reasonableness of the limitation is the criterion of validity. Many cases have made the extent of territory covered by the prohibition the final and conclusive test. Yet this is not always infallible. If the extent of the restraint upon one party is not greater than the protection to the other party requires, the contract is reasonable and valid: *Roussillon v. Roussillon*, 14 Ch. Div. 351; s. c. 19 Am. Law Reg. 748. Thus, an agreement of a solicitor to relinquish the practice of his profession in London, or within one hundred and

fifty miles thereof (*Bunn v. Guy*, 4 East 190), or even if the prohibition extends throughout the whole kingdom (*Whittaker v. Hou* 8 Beav. 383), is valid; while an agreement of a dentist to abstain from the practice of dentistry within a circuit of one hundred miles was held void: *Horner v. Graves*, 7 Bing. 735; s. c. 5 Moore Payne 768.

(b) *Rule Stated.*—Subject to the exceptions which will hereafter appear, the general principle may be thus stated: All contracts in restraint of trade whose operation is general, are void. The application of the rule is more difficult than a clear understanding of it. Contracts to abstain from a business everywhere, or throughout the realm, and, usually, contracts whose prohibition covers the entire state, or a large part thereof, come within this principle.

(c) *Application of the Rule.*

(1.) *Restraints extending everywhere.*—A contract not to carry on a business anywhere is clearly unreasonable, for its operation is general. It can be of no benefit to either party. And if one agrees to abstain from a certain business at any place where the vendee might carry on the same business, the agreement is unenforceable. *Thomas v. Miles's Admrs.*, 3 Ohio St. 274 (1854; *Head v. Lowe*, 47 Iowa 137 (1877); *Gale v. Reed*, 8 East 80 (1806); *Mossop v. Mason*, 18 Gr. Ch. (Ont.) 453 (1871); *Kennedy v. L.* 3 Mer. 440, 451, 452 (1817); *Lange v. Werk*, 2 Ohio St. 5 (1853). So is an agreement to abstain from the business of brewing at P. or elsewhere: *Hinde v. Gray*, 1 M. & G. 195 (1840); s. c. Scott (N. S.) 123; see *Curtiss v. Gokey*, 68 N. Y. 300 (1877); s. c. 5 Hun 555 (1875); *Bank v. King*, 44 N. Y. 87 (1870); *Peltz v. Eichele*, 62 Mo. 171 (1876); or coal merchant for nine months: *Ward v. Byrne*, 5 M. & G. 548, 562 (1839); 13 Jur. 1175; or stipulation by one partner, on selling out his share, "to cease being in that trade;" *Maier v. Hoofman*, 4 Daly (N. Y.) 168 (1871); or a bond conditioned that the obligor shall never conduct or be engaged in the yeast powder business; *Callahan v. Donnolly*, 4 Cal. 152 (1872); or in the business of founding iron; *Alger v. Phacher*, 19 Pick. (Mass.) 51 (1837).

(2.) *Same. Throughout the Realm.*—It is evident that a contract not to pursue one's trade in the entire realm or country is void, because the country suffers the loss of being deprived of the restricted party's industry; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. *Oreg*

Steam Navigation Co. v. Winsor, 20 Wall. 68 (1873). Thus, a stipulation not to be connected either "directly or indirectly" in the manufacture of stearin candles for a specified time in any part of the United States is void: *Lange v. Werk*, 2 Ohio St. 519 (1853). So is an agreement between partners engaged in manufacturing daguerreotype materials, on dissolution, that one shall never engage in that business again in any part of the United States. *Dean v. Emerson*, 102 Mass. 480 (1869).

(3.) *Same. Throughout a State.*—It has been held that a bond not to engage in the business of asphaltum roofing and pavement-laying in the city or county of San Francisco, or state of California," is void: *Moore v. Bonnett*, 40 Cal. 251 (1870); or never to engage in the business of manufacturing and selling shoe-cutters at any place within the state of Massachusetts: *Taylor v. Blanchard*, 13 Allen 370 (1866); or to abstain from running a steamboat on any of the waters of California: *Wright v. Ryder*, 86 Cal. 357 (1868). These cases proceed upon the theory that if such contracts were upheld, the one bound would be compelled to transfer his residence and allegiance to another state in order to pursue his avocation. Judge SELDEN, of the New York Supreme Court, in answer to the contention that no restraint could be general which operated in a single state only, denounced it to be repugnant to "the general frame and policy of our government to regard the Union, in respect to our ordinary internal and domestic interests, as one consolidated nation. For all these purposes, each state is a separate community, with separate and independent public interests." *Lawrence v. Kidder*, 10 Barb. 641 (1851). "But this mode of applying the rule," says BRADLEY, J., (*Oregon Steam Navigation Co. v. Winsor*, *supra*,) "must be received with some caution. This country is substantially one country, especially in all matters of trade and business, and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular trade or business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New

York, where his associate is to reside and carry on business. Can any one doubt that such an agreement would be valid? *Stearns v. Barrett*, 1 Pick. (Mass.) 442 (1823). Contracts in sale of product of secret manufacture of articles which restrain the vendor from engaging in the manufacture of them are valid. Cases must be adjudged according to their circumstances, and can only be rightly judged when the reasons and grounds of the rule are carefully considered." Accordingly, upon the sale of a steamboat, a covenant not to run it on the waters of the state of California was sustained. *Oregon, &c., Co. v. Winsor*, *supra*.

Judge CHRISTIANCY'S views on this question fully accord with those of the Supreme Court of the United States. And he sustained a bond given by a printer and publisher, whose business extended throughout the state of Michigan, stipulating never to carry on that business within that state. *Beal v. Chase*, *supra*. See remarks of this judge, *ante*. Upon principle, the latter view is undoubtedly the correct one. Contracts which embrace the entire state must be determined upon the same principle as those which contemplate a general restraint.

(4.) *Same. Throughout a large portion of a State or Country.* The same reasons which have been given for declaring contracts in general restraint of trade void, apply with equal force to those which seek to deprive a large portion of a state or country of a restricted party's labor. The same evils follow in both cases. Thus a stipulation of a dentist not to practise dentistry within a circle of 200 miles in diameter, in England, is void: *Horner v. Grainger*, 7 Bing. 735 (1831). So is a contract that the vendor will not carry on the perfume business at any place within 600 miles of London. *Price v. Green*, 16 M. & W. 346 (1847); s. c. 13 M. & W. 695; that he will not engage in manufacturing or trading in palm-beds or mattresses, in all the territory of the state of New York west of Albany: *Lawrence v. Kidder*, 10 Barb. 641 (1851).

(5.) *Same Commerce upon the High Seas.*—If these contracts restrain, or tend to restrain, unreasonably, commerce upon the high seas, they are equally void for the same reasons that declare them invalid on land. For the benefit of all nations that strive for commercial supremacy, this enterprise should be free from restriction. Therefore, if one ocean steamship company agrees with another to abstain from running ships between North and South America, such contract is invalid: *Murray v. Vanderbilt*, 39 Barb. 140 (1862).

(6.) *Same. Confined to Locality, but subject to Covenantor's selection.*—In *Thomas v. Miles's Administrator*, 3 Ohio St. 274 (1854), one party covenanted not to carry on a certain business at any place where the other party might carry on the same business. This case decided that where the restraint is confined to localities, if they are not definitely ascertained, and their location is subject to the vendee's selection, the contract is void because of its too general operation.

(7.) *Time.*—A limitation as to time is never a necessary element in determining the validity of these contracts. If the restraint is unreasonable as to space, the contract is void, however limited as to time. There are good reasons for this. The public is injured during the continuance of the restriction. Between a perpetual and limited restraint the only difference is the degree of mischief. It is well to remember that if the public is injured in the least, this is sufficient to nullify the agreement. On principle, the degree of injury, as affecting the validity or invalidity, ought never be considered. Thus, a contract of an innkeeper, upon selling his inn, to abstain from business for ten years (*Mossop v. Mason*, 18 Grant Ch. R. (Ont.) 453 (1871)), or a coal merchant, not to follow his business for twenty years (*Ward v. Byrne*, 5 M. & W. 548, 562 (1839); 3 Jur. 1175), or a manufacturer not to manufacture certain kinds of articles for a period of thirty years, have been condemned (*The Saratoga Co. Bank v. Bank*, 44 N. Y. 87 (1870)). See, also, *Bowser v. Bliss*, 7 Blackford (Ind.) 344; s. c. 43 Am. Dec. 93, with note, which holds that if the duration is indefinite as to time, this will not invalidate the contract.

8. *Restraints removable at the Option of the Party bound.*—It has been questioned whether agreements should be declared void which reserve to the party bound the power to remove the restraint upon paying a bonus to the other party, and it was decided that they were equally void: *Keeler v. Taylor*, 53 Penn. St. 467. No one has a right to consent to the payment of tribute for the purpose of exercising a calling. Every man holds his freedom in trust for the public. Society is entitled to the fruits of his toil. In referring to the restraint in the above case, the court said: "Is it reasonable to impose such a tribute upon the labor of a mechanic? Is not its direct tendency to restrain his skill in a useful art? And even if at law damages might be recovered for breach of such a contract, ought a court of equity to enforce it? According to the

doctrine of the cases, these questions will admit of no answers favorable to the plaintiff. He was not the patentee of scales, selling his right to another; nothing of that sort appears in the case. It was a sale merely of his handicraft, and whilst the parties were free to fix their own value of that, a contract that restrained the industry of the defendant, not in a particular locality, but everywhere * * * was contrary to public policy."

(d) *Exceptions to the Rule.*

I. *Classification of Exceptions.*—As has been stated, there are exceptions to the general principle that all contracts in general restraint of trade are void. These exceptions may be classified as follows:

1. Where the vendee requires the protection secured by the restraint; or
2. Where the contract is made to put an end to ruinous competition; or
3. Where the advantages secured by the contract are mutual; or
4. Where the contract is given to protect a patented invention, trade-mark, or secret process of manufacture; or
5. Where the business restrained is contrary to the policy of the law where made. These will be considered in the order enumerated:

II. *Exceptions considered.*

(1.) *Where the Vendee requires the protection secured by the restraint.*

(a) *Scope of Principle.*—This exception, like the general rule, cannot be applied to all classes of cases without limitation. Its application is only extended so far as to afford a fair protection to the vendee, yet not so far as to conflict with the public weal. Private interests must succumb to the public welfare. But if the promisee's business requires the restraint, and to protect him in it would not deprive the public of any advantage, the contract will be enforced. For to enforce a contract which deprives the public of any advantage, although the interests of the promisee requires it, would be to give protection to a private citizen at the expense of the public, and deny society the power of self-protection. If we keep in mind the reasons of the principles, which have been heretofore stated, the scope of this exception will be more readily understood.

(b) *Cases where applied.*—The interests of the promisee may be

considered in two classes of cases, namely: 1. Where the restraint is strictly for the protection of the promisee, with reference to the extent of the business, and 2. Where it secures to the promisee the exclusive custom of the promisor.

(1) In the first class of cases there is apparent conflict in the decisions. In England some cases have made the protection of the promisee the controlling element in determining the validity of the restraint. In *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351; (s. c. 19 Am. Law Reg. 728, note by Judge BENNETT,) a traveller for a wine merchant, in making his contract of employment, agreed not to carry on the wine business for two years after leaving the merchant's employment. The promisee's business extended throughout England and Scotland, and like business done anywhere in the kingdom would interfere with his trade. It was contended that a restraint which extended throughout an entire country could not be upheld, even if the business of the promisee did require the protection, for that would compel the party thus bound to abandon his regular calling, or expatriate himself in order to follow it. The court, in sustaining the contract on the ground that the interest of the promisee required it, repudiated this contention, and declared that the operation of such a limitation would be unjust; that it would afford complete protection to a business local in its nature, while it would deny protection to a business extending throughout a kingdom. Then, according to the doctrine of this case, it follows as of course, that the restraint is reasonable, if the promisee's business requires it, however injurious the consequences to the public. Rather than adopt a rule which might operate unequally, the court preferred to ignore the public policy which is the foundation of the whole doctrine, and declare that in such cases the restraint may legally be co-extensive with the business.

Other English cases have likewise extended this exception. And an agreement of a solicitor to relinquish the practice of his profession in London, or within 150 miles thereof, (*Bunn v. Guy*, 4 East 190); or even if the restraint extends throughout the entire kingdom (*Whittaker v. Howe*, 3 Beav. 388), was sustained for the reason that the promisee required the protection.

In this country this principle has never been extended so far. Yet contracts have been declared valid that required the vendor to remove from a state in order to pursue his accustomed avocation in deference to this principle of protection: *Beal v. Chase*, 31 Mich.

490; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 67; but as heretofore observed, upon this question there is some conflict. *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641. When Judge BRADLEY, of the United States Supreme Court, declared that when such restraints "the party is deprived of his occupation, or obliged to expatriate himself in order to follow it," he gave the true limitation of the exception. "A contract," continues he, "the validity of which is open to such grave objections is clearly against public policy. But if it only affords 'a reasonable ground of benefit to the other party, it is free from objection and may be enforced.'" 20 Wall. 67. Thus, upon the sale of a steamship, a stipulation of the purchaser that he would not employ the ship for ten years in the waters of California, where it appeared that such a stipulation was for the benefit of the other party, and also that such was the inducement of the sale, was held binding. *Id.* Compare this with *Wright v. Ryder*, 36 Cal. 342, where a similar agreement was held void. As to a bond given by a printer or publisher, whose business extends throughout the state of Michigan, upon the sale thereof, never to engage again in such business within the state, was sustained in *Beal v. Chase*, 31 Mich. 490; see *Ainsworth v. Bentley*, 10 Weekly Rep. 630; *Ingram v. Stiff*, 5 Jur. (N. S.) 947; *Jones v. Lees*, 1 Hurl. & Norm. 189; *Allsop v. Wheatcroft*, L. R., 15 E. 59, 64.

Where the restraint only secures to the promisee the exclusive custom of the promisor, it will be held valid. Thus a contract not to buy meat of any one but the promisee for six months is valid in *Lightner v. Menzel*, 35 Cal. 452 (1868); so is an agreement of a publican to purchase all beer of his creditors: *Thornton v. Sheppard*, 8 Taunt. 529 (1818); see *Holcombe v. Hawson*, 2 Camp. 35 (1800); or an agreement to furnish one party with sewing-machines upon credit and at a discount, provided the other party will deal with him exclusively: *Brown v. Rounsavell*, 78 Ill. 589 (1875); see *Fisken v. Rutherford*, 8 Gr. Ch. (Ont.) 9 (1860); or to deal with one certain grocer exclusively, *Lenz v. Brown*, 41 Wis. 172 (1876); see *Holtz v. Schmidt*, 59 N. Y. 253; *Weaver v. Sessions*, 1 Mass. 505 (1815); s. c. 6 Taunt. 154; *Gale v. Reed*, 8 East 8 (1806); or to employ no person but A. to make cordage for C. D.: *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; or an agreement of one railroad company with another to employ no cars but the latter company's in the transportation of locomotive engines and tenders.

over the former company's road : *Erie Railroad Co. v. Union Locomotive & Express Co.*, 35 N. J. L. 240 (1871).

2. *Restraints to put an end to Ruinous Competition.*—Contracts which have for their object the prevention of ruinous competition have been sustained on the ground of the benefit the public derives from them, as well as the parties thereto, in the advancement of the particular trade or industry they seek to protect. There is much danger to be apprehended in extending this principle too far ; but, when properly applied, private capital is thereby saved from disastrous rivalry, and enabled to add to the wealth of the community, thus exerting a wholesome influence upon the industrial or business interests of the state. The propriety of sustaining such contracts is seriously questioned by those who believe implicitly in the maxim, that "competition is the life of trade." It is to be observed that here the same limitation, as heretofore stated, in referring to the interest of the promisee, namely the agreement must not injure the public—holds good. The essential question is one of monopoly and injury to the public. On this ground, an agreement among the stevedores of a certain port to divide the stevedoring business, and share profits and losses arising therefrom, was sustained in England. *Collins v. Locke*, L. R., 4 App. Cas. 674 ; 28 W. R. 189 ; Whart. on Cont. §§ 442, 442a and notes. The court of the same country, also, declared valid an agreement between two railroad companies, based upon the exchange and division of traffic, for the same reasons. *Hare v. Railroad Co.*, 2 Johns. & H. 80 ; 30 L. J. Ch. 817 ; see, also, *Shrewsbury Railroad Co. v. London, &c., Railroad*, 20 L. J. Ch. 90, 102. But no contract of the latter kind has ever been sustained by the courts of this country. In another English case three rival trunk and box-makers entered into an agreement by which they divided England into three districts, each taking one, and each engaging not to interfere with the trade of the others. It appearing that this was done to prevent loss and inconvenience resulting from all doing business in the same territory, the contract was held valid. *Wickens v. Evans*, 3 Y. & J. 318 (1829). And similar contracts have been upheld in this country, where good reasons appeared for making them, and their operation was limited,—and where they did not cause a monopoly of the business they endeavored to advance. *Skrarink v. Scharringhausen*, 8 Mo. App. 522 ; *Perkins v. Lyman*, 9 Mass. 522 (1813). On the other hand, like

agreements, whose avowed purpose was to stimulate and encourage trade, but whose tendency might injure the public, have been held void. *Morris Run Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Arnold v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *India Asso. v. Kock*, 14 La. Ann. 168.

3. *Where the Benefits secured by the Contract are mutual.*—The policy of the law is to encourage and protect individual enterprises. Therefore, contracts which secure mutual advantage to the parties are always held valid, unless clearly detrimental to the well-being of society. These may be ranged under the following heads:

(a) *Agreements of Joint Inventors.*—An agreement between two joint inventors of a certain machine that one should sell the machine exclusively in two states and the other in the rest of the United States, is valid because of the reciprocal advantage given to the parties: *Stearns v. Barrett*, 1 Pick. 443 (1823).

(b) *Agreements to secure Benefits of an Invention.*—If, for the purpose of securing the benefit of an invention, a contract is made to put no machines upon the market without it, it will be sustained: *Jones v. Lees*, 1 H. & N. 189 (1856); 2 Jur. N. S. 645; N. I. J. Exch. 9; *Billings v. Ames*, 32 Mo. 265 (1862).

(c) *Agreements to Labor exclusively for a particular Person.*—In this class of cases no agreement will be sustained whose effect is to withdraw permanently and absolutely from the market any specific quota of labor by which the market would be improved: See note of Dr. Francis Wharton to *Sharp v. Whiteside*, 19 Fed. Rep., p. 166. But a contract to sell lime exclusively to a certain person for six months is valid: *Schwan v. Holmes*, 49 Cal. 665 (1875); or mint oil for two years: *Van Marter v. Babcock*, 23 Barb. 63 (1857); or all ore that the promisee may need: *Long v. Towne*, 42 Mo. 545 (1868); or to labor for no other person than the promisee for seven years: *Pilkington v. Scott*, 15 M. & W. 657; or for life: *Wallis v. Day*, 2 M. & W. 273 (1837); 1 Jur. 73. On the same principle, contracts of authors to write exclusively for particular publishers will be enforced: *Morris v. Coleman*, 1 Vesey 437 (1811); *Stiff v. Cassell*, 2 Jur. (N. S.) 348 (1856). Likewise engagements of actors and opera singers to give their services for a specified season: *McCaull v. Braham*, 16 Fed. Rep. 300; N. C. Cir. Ct. N.Y. (1888). To same effect, see *Howard v. Hopkyns*, 2 Atk. 371; *Fox v. Scard*, 33 Beav. 321; *Jones v. Seamans*, 4 Cl. Div. 636; *Barnes v. McAllister*, 18 How. Pr. 534; *Nessle v. Rees*.

29 Id. 382; *Warren v. Jackson*, 46 Id. 389. In some cases contracts for the abandonment of a business, in consideration of being furnished with employment for life, will be sustained: *Wallis v. Day*, 2 M. & W. 273 (1837); 1 Jur. 78; 15 Vin. Abr. 323. See *Hartley v. Cummings*, 5 C. B. 246 (1847); s. c. 2 C. & K. 433; s. c. 12 Jur. 57; 17 L. J. C. P. 84; *Pilkington v. Scott*, 15 M. & W. 657; or, in consideration of becoming part owner of a patent, to conduct exclusively the business of manufacturing and dealing in machines of that patent: *Kinsman v. Parkhurst*, 18 How. (U. S.) 289 (1855).

4. *Contracts to protect Patented Inventions, Trade-Marks and Secret Processes of Manufacture.*—The law looks with favor upon contracts which have for their object the protection and encouragement of patents, trade-marks and secret processes of manufacture. Therefore, in the sale of these articles, covenants of the vendor not to enter into competition with the vendee are valid: *Patents.*—*Morse & Twist Drill, &c., Co., v. Morse*, 103 Mass. 73 (1869); sale of patent pen, *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Sup. Ct. (16 J. & S.) 442, 447 (1882). *Sale of Secrets.*—*Hagg v. Darley*, 47 L. J., N. S. Ch. Div. 567 (1878); s. c. 38 L. T., N. S. 312; *Bryson v. Whitehead*, 1 Sim & Stu. 74 (1821); s. c. 1 L. J. Ch. 42; *Morison v. Moat*, 9 Hare 241 (1851); *Green v. Tolgham*, 1 S. & S. 389; *Williams v. Williams*, 3 Mer. 158; *Yovatt v. Wingard*, 1 J. & W. 394; 30 L. J. Ch. 209, 213, 219; *Wyatt v. Wilson*, 1 M. & G. 46; *Albert v. Strong*, 1 Id. 25; *Tipping v. Clarke*, 2 Hare 383; 24 Eng. Ch. R. 383; *Brewer v. Lamar*, S. C. Ga. 18 Cent. L. J. 54; *Gillis v. Hall*, 2 Brewster 342; s. c. 7 Phila. (Penn.) 422; 27 Leg. Int. 1870, p. 302; *Hard v. Seeley*, 47 Barb. 428; *Leather Cloth Co. v. Lorscheint, L. R.*, 9 Eq. 345 (1869); *Alcock v. Giberton*, 5 Duer (N. Y.) 76 (1855); *Peabody v. Norfolk*, 98 Mass. 452; *Vickery v. Welch*, 19 Pick. 523. "Public policy requires," as was said in one case, "that when a man has by skill or by any other means obtained something he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser:" *Leather Cloth Co. v. Lorscheint, L. R.*, 9 Eq. 354, 355.

5. *Business restrained contrary to Policy of the Law.*—Contracts

in restraint of a business condemned by the policy of the law good. The reasons of this principle are obvious. The policy of the law is only to promote and encourage those trades and employments which advance the public welfare. Therefore, any public employment which the laws of a country or state seek to restrain, may be restrained, for it is not within the protection of the law. Thus, if the public policy of a state, as evinced by legislative enactment, is directed to suppress the liquor traffic, such business may be restrained within that state's borders: *Harrison v. Lockhart*, 11 Ind. 112 (1865). The liquor traffic is injurious to the public interests, and hence the reasons of the rule protecting other employments does not apply to this one, and, therefore, it cannot be said to be within the rule. The public sentiment of Indiana has always been against the liquor traffic. "The legislature enacted the law upon the assumption that the manufacture and sale of beer, &c., were necessarily destructive to the community:" *Lockhart v. The State*, 6 Ind. 520. Laws were passed in the reigns of Edward III., Henry III. and Henry VIII., prohibitory in character, of the sale of liquor. In the time of Henry III. a law was passed disqualifying persons engaged in such employment from holding any office of a judicial or executive character. In the present century, in our country, movements were commenced among the people which, to a greater or less extent, have from time to time influenced legislation, and at present the traffic in importing liquor, as a beverage, is absolutely prohibited in some of the states of the Union: 25 Ind. 114. See, also, *Dixon v. U. Brock*. (MS. Dec.) 177, for illustration of contract restrained by business against public policy.

VII. PARTIAL RESTRAINTS.

(a) *Criterion of Validity*.—The same general principles govern contracts in general restraint of trade, apply with equal force to contracts which contemplate a partial or limited restraint. Contracts of the latter kind are valid and binding. *Angier v. Wells*, 14 Allen (Mass.) 211; *Mitchel v. Reynolds*, 1 P. Wms. 1; *Noble v. Bates*, 7 Cow. (N. Y.) 307; 10 Mod. 27, 85, 13 Mod. 230; 2 Saund. 156 A. N. (1); 2 Str. 739; 2 Ld. R. 1456; 3 Bro. P. C. 349; Br. Ch. 418; 5 T. R. 118; 5 Cow. 145 and 150 N.; 3 Johns. Cas. 297; 7 Johns. 72; 13 Wend. 17 Wend. 454; 21 Id. 162; 10 Paige 123; 10 N. Y. 244

N. Y. 304; 8 Barb. 45; 11 Id. 134; 12 Id. 381; 4 How. Pr. 408; 9 Id. 338; 13 Id. 238; 34 Id. 205; 51 Id. 378; 1 E. D. Smith 581. No rule as to the exact extent of territory covered by these restraints can be given: the restraint will be considered limited and valid if it is not unreasonable. *Pyke v. Thomas*, 4 Bibb (Ky.) 486; 7 Am. Decisions 741, and note; *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351; s. c. 19 Am. Law Reg. 748, and note. The point of difficulty, in these cases, is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. "And it is obvious at first glance," remarked BRADLEY, J., (*Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 68, 69), "where it is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void." *Hutchcock v. Coker*, 6 Ad. & El. 454, "that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation; *provided it does not violate the two indispensable conditions that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.*"

(b) *Rule stated.*—The principle, as deduced from the authorities, so far as concerns space, is that the validity depends upon the reasonableness of the contract, and there is no other rule limiting the area over which the contract may legally extend. The contract must be considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made; and if the restraint contracted for appears to have been for a just and honest purpose—for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as to them, and not specially injurious to the public—the restraint will be valid.

Hubbard v. Miller, 27 Mich. 15 (1873), per CHRISTIANCY, J. *Leggott v. Barrett*, 43 L. T. Reports (N. S.) 641. In *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351, it was stated that if the effect of the restraint upon one party is not greater than protection the other party requires, the contract is reasonable and valid. It is obvious that the principle is too broadly stated. If the protection of the promisee required the other party to give up his calling, he is deprived the public of the benefit of his exertions, the contract is clearly against public policy. The principle thus extended would certainly be harmful to the public, and ought never be applied without limitation.

(c) *Reasonableness of the Restraint a Question of Law.*—Whether the restraint is reasonable with reference to territory is a question of law, to be decided in view of the circumstances of each particular case. *Gilman v. Dwight*, 13 Gray 356; *Taylor v. Blanchard*, Allen 370; *Treat v. Melodeon*, 35 Conn. 543; *Guarand v. de la Motte*, 32 Md. 561; *Grasselli v. Lowden*, 11 Ohio St. 349; *Allen v. Lister*, 42 Ind. 15; *Linn v. Sigsbee*, 67 Ill. 75; *Allen v. Lowe*, 47 Iowa 137; *Chappel v. Brockway*, 21 Wend. 481; *Jones v. Heavens*, L. R., 4 Ch. Div. 636.

(d) *Application of the Rule.*—If the business sold is extensive, a greater restraint will be permitted than in case of a business necessarily local or limited in its nature. An agreement not to practice law in London, or within 150 miles thereof, is valid. *Bunn v. Bunn*, 4 East 190; so is an agreement of a publisher, covering the whole space. *Tallis v. Tallis*, 1 El. & Bl. 391; 17 Jur. 1149; 22 Q. B. 185. An agreement of a milliner, upon sale of her business, to abstain from conducting the same business within such distance as might interfere with the business sold, is valid. *Morgan v. Morgan*, 36 Ohio St. 519; s. c. 38 Am. Rep. 607. And a covenant of a miller not to engage in the milling business within 30 miles of a certain place is reasonable; *Bowser v. Bliss*, 7 Black (13) 344; s. c. 43 Am. Dec. 93, with note; so is a contract of a physician not to practise medicine within 20 miles of a given place: *Butler v. Burleson*, 16 Vt. 176; see also *Hayward v. Young*, 2 Chitty 481; *Gravely v. Barnard*, L. R., 18 Eq. 518; 43 L. J. Ch. 659; 3 L. T. (N. S.) 863; covering a distance of 10 miles: *Cook v. Johnson*, Conn. 175; *Bets's Appeal*, 10 W. N. C. 431; or 12 miles: *McClure's Appeal*, 58 Pa. St. 51; or 15 miles: *Miller v. Elliott*, 1 Ind. 481. It is also reasonable; or an apothecary not to conduct an apothecary

shop within 20 miles of the old stand: *Hayward v. Young*, 2 Chitty 407; see also *Sainter v. Ferguson*, 7 C. B. 716; s. c. 13 Jur. 828, where an agreement not to act as an apothecary within 7 miles of a certain town was held valid; or a lawyer not to practise law within 21 miles of a certain place: *Dendy v. Henderson*, 11 Exch. (H. & G.) 194; 24 L. J. Exch. 326; see *Linn v. Sigsbee*, 67 Ill. 75; or a merchant to abstain from the mercantile business within 10 miles of the business sold, *Gompers v. Rochester*, 56 Penn. St. 194; see *Haldeman v. Simonton*, 55 Iowa 144 (1880). It is reasonable for a butcher to agree not to engage in his business within a distance of 5 miles: *Elves v. Crofts*, 10 C. B. 239; or a gas-fitter not to engage in his business for a distance of 20 miles: *Hitchcock v. Coker*, 6 Ad. & El. 438; or not to conduct the business of manufacturing soap within 40 miles of a place: *Ross v. Sadgbeer*, 21 Wend. 166; or not to carry on a saddlery and harness shop within 20 miles of a place: *Nobles v. Bates*, 7 Cow. 307; or within 10 miles of a place: *Jones v. Heavens*, L. R., 4 Ch. Div. 636: see, also, *Harrison v. Lockhart*, 25 Ind. 112; *Curtiss v. Gokey*, 68 N. Y. 300; 8 Scott N. R. 674; 7 M. & G. 969; 8 Jur. 105; 14 L. J. C. P. 10; *Taylors v. Clark*, 2 Show. 350; *Jollie v. Broad*, 2 Roll. Rep. 201; s. c. Noy 98; *Prugnell v. Gosse*, Allyn 67; *Noah v. Webb*, 1 Edw. Ch. (N. Y.) 604; *Dan-kin v. Williams*, 11 Wend. 67; *Middleton v. Brown*, 47 L. J. N. S. Ch. Div. 411; *Benwell v. Inns*, 24 Beav. 307; s. c. 26 L. J. Ch. 663; *Shackle v. Baker*, 14 Ves. 468.

On the same principles, agreements not to follow a business in a county, *Lange v. Werk*, 2 Ohio St. 517; see *Weller v. Hersee*, 10 Hun (N. Y.) 431; *Dean v. Emerson*, 102 Mass. 480; or in a limited territory: *Richardson v. Peacock*, 33 N. J. Eq. 597 (1881); *Avery v. Langford*, 1 Kay 663 (1854); or a large portion thereof, Id.; or over a certain limited route over which the vendor was in the habit of conducting his business, are reasonable and valid: *Angier v. Webber*, 14 Allen 211 (1867); *Dunlop v. Gregory*, 10 N. Y. 241 (1851); *Chappel v. Brockway*, 21 Wend. 159 (1839); *Archer v. Marsh*, 6 Ad. & El. 959 (1837); *Leighton v. Wales*, 3 M. & W. 545 (1838); *Davis v. Barney*, 2 Gill & J. (Md.) 382 (1830); *Pierce v. Fuller*, 8 Mass. 223 (1811); *Westfall v. Mapes*, 3 Grant Cas. (Pa.) 198 (1855); *Homer v. Ashford*, 3 Bing. 322 (1825); *Boutelle v. Smith*, 116 Mass. 111 (1874); *Ewing v. Johnson*, 34 How. Pr. (N. Y.) 202 (1864); *Mumford v. Gething*, 6

Jur. (N. S.) 428; s. c. 29 L. J. C. P. 105; 8 W. R. 187; 1 L. N. S. 64; 7 C. B. N. S. 305. So agreements to relinquish practice of a profession within the limits of a town: *Doty v. Mar* 32 Mich. 462 (1875); *Dwight v. Hamilton*, 113 Mass. 175 (1875); *Mott v. Mott*, 11 Barb. 127 (1851); *Niver v. Rossman*, 18 Ba 50 (1853); *Haldeman v. Simonton*, 55 Iowa 144 (1880); *man v. Dwight*, 13 Gray (Mass.) 356 (1859); *Cook v. John* 47 Conn. 175 (1879); *Smalley v. Green*, 52 Iowa 241 (1879); *Zimmerman v. Devin*, 17 W. Rep. 230; s. c. 23 Am. L. R. 50 (1883), note; or city, *Mallan v. May*, 11 M. & W. 652 (1844) or to abstain from a business in a town, *Grundy v. Edwards*, 7 J. Marsh. (Ky.) 368; s. c. 23 All. Dec. 409; *Pike v. Thomas* Am. Dec. 741; *Heichew v. Hamilton*, 3 G. Green (Iowa) 5 (1852); *Gompers v. Rochester*, 56 Pa. St. 194 (1869); *Hoagland v. Segur*, 38 N. J. L. 230 (1876); *Whitfield v. Levy*, 35 N. J. 149 (1871); *Roller Co. v. Ott*, 14 Kan. 609 (1875); *Clark v. Crosby*, 37 Vt. 188 (1864); or city, *Green v. Price*, 13 M. & W. 695 (1845); s. c. *Price v. Green*, 16 M. & W. 346 (1847); *W* v. *Voyt*, 3 La. Ann. 16 (1848); *Viegas v. Forsbee*, 9 Id. 2 (1848); *Muller v. Vettel*, 25 How. Pr. (N. Y.) 350 (1864); *Colmer v. Clarke*, Cas. temp. Hardwicke 135; *Beard v. Dennis*, 6 Ind. 2 (1855); *Goodman v. Henderson*, 58 Ga. 567 (1877); *Thomas v. Adair*, 3 Ohio St. 274 (1854); *Stewart v. Challacombe*, 11 Br. & W. App. (Ills.) 379 (1882); *Dakin v. Williams*, 11 Wend. (N. Y.) 67 (1833); *Pierce v. Woodward*, 6 Pick. 206 (1828), have been enforced. This principle is applicable to all kinds of occupations and professions: *Smalley v. Green*, 52 Iowa 241; *Whittaker v. Howe*, 3 Beav. 383, 393, per Ld. LANGDALE; and the contract is valid whether made by parol or bond, *Thompson v. Means*, 1 Sm. & Mar. (Miss.) 604; *Pierce v. Fuller*, 8 Mass. 223; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Alger v. Thacher*, 19 Pick. 51; with an alien: *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 3 (1880). The restraint may operate upon a third person: *Presbury v. Fisher*, 18 Mo. 50; *Gilman v. Dwight*, 13 Gray (Mass.) 356; it may begin in the future: *Butler v. Burleson*, 16 Vt. 176 (1845); *Grasselli v. Lowden*, 11 Ohio St. 349, and the damages for a violation may be liquidated: *Miller v. Elliott*, 1 Ind. 484; *Duffy v. Shockey*, 11 Ind. 71; *Hoagland v. Segur*, 38 N. J. L. 230; and as to like general restraints, indefiniteness as to time does not affect the validity. *Jacoby v. Whitmore*, 49 L. T. (N. S.) 335; *Cook v. Jo*

son, 47 Conn. 175; *Hastings v. Whitley*, 2 Exch. 611; *Bowser v. Bliss*, 7 Blackf. 344; *Ward v. Byrne*, 5 M. & W. 548; *Allsopp v. Wheatcroft*, L. R., 15 Eq. 59; *Catt v. Tourle*, L. R., 4 Ch. App. 659; *Perkin v. Clay*, 54 N. H. 518.

(e) *Presumptions*.—The law presumes all contracts in restraint of trade bad, if nothing more appears: *Mitchel v. Reynolds*, 1 P. Wms. 181; *Mallon v. May*, 11 M. & W. 653; *Chappel v. Brockway*, 21 Wend. 157; *Hoffman v. Brooks*, 11 W. L. Bull. (O.) 258; *Bozer v. Bliss*, 7 Blackf. (Ind.) 344; *Hornor v. Graves*, 7 Bing. 735; *Kellogg v. Larkin*, 3 Pinney (Wis.) 123; s. c. 3 Chandler (Wis.) 133; *Elves v. Crofts*, 10 C. B. 247; *W. Va. Tel. Co. v. Ohio R. P. L. Co.*, 22 W. Va. 600; *Pierce v. Fuller*, 8 Mass. 223. But see *Hubbard v. Miller*, 27 Mich. 15, per CHRISTIANCY, J., and whether this presumption is overcome is a question of law: *Tallis v. Tallis*, 1 El. & Bl. 391; *Kellogg v. Larkin*, 3 Pinney 123; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Lum v. Sigbee*, 67 Ill. 81. If the petition does not show facts sufficient to overcome this presumption, it is bad. *Metzger v. Cleveland*, 3 Indiana Law Magazine, 42, 44; *Lange v. Werk*, 2 Ohio St. 519, 528.

(f) *Consideration*.—The petition, to be good, must not only show that the restraint is partial, but it must also show that the contract is founded upon a valuable consideration, and that it is reasonable and not oppressive. *Thomas v. Mills*, 3 Ohio St. 275; *Brewer v. Marshall*, 4 Green Ch. 537; *Wright v. Ryder*, 36 Cal. 357; *Holbrook v. Waters*, 9 How. Pr. 335; *Dunlop v. Gregory*, 10 N. Y. 241; *Chappel v. Brockway*, 21 Wend. 157; *Holmes v. Martin*, 10 Ga. 503; 2 Pars. on Cont. 753; *Mitchell v. Reynolds*, 1 Smith's Lead. Cas. 724, with instructive note; *Lange v. Werk*, 2 Ohio St. 528. Some cases have laid down the rule that the consideration must be adequate: *Homer v. Graves*, 7 Bing. 735; *Young v. Timmins*, Tyr. 226; *Long v. Towl*, 42 Mo. 545; *Mitchel v. Reynolds*, 1 P. Wms. 181; but the weight of authority is against this rule: *Collins v. Locke*, L. R., 4 App. Cas. 674; *Hitchcock v. Coker*, 6 Ad. & E. 439; *Duffey v. Shockey*, 11 Ind. 70; *Grasselli v. Loudon*, 11 Ohio St. 349; *Archer v. Marsh*, 6 A. & E. 959; *Gravelly v. Barnard*, L. R., 18 Eq. 518; *Leigeton v. Wales*, 3 M. & W. 545; *Ward v. Byrne*, 5 Id. 548; *Pilkington v. Scott*, 15 Id. 657; *McClurg's Appeal*, 58 Pa. St. 51; *Price v. Green*, 16 M. & W. 346; *Lawrence v. Kidder*, 10 Barb. 641; *Middleton v. Brown*, Eng. Ct. App., 47 L. J. N. S., Ch. Div. 411; *Hubbard v. Miller*, 27

Mich. 15; and whether the consideration is adequate or not, is a question which the court will not examine. If the contract shows on its face a legal consideration, it is sufficient; but whether it is adequate or inadequate to the restraint imposed, must be determined by the parties themselves, upon their own view of the circumstances attending the particular transaction; whereas, if it were otherwise, it would be the court and not the parties making the contract: *Guerand v. Dandeleit*, 32 Md. 561. It has been stated that the reasonableness of the consideration is a question of law, the evidence not being admissible outside of the contract, therefore the cause of the consideration must be disclosed. 2 Addison Cont. 741, bottom paging and note (g).

EUGENE MCQUILLAN.

St. Louis, Mo.

RECENT ENGLISH DECISIONS.

Court of Appeal.

JOSEPH v. LYONS.

A registered bill of sale of personal property which includes stock in trade to be afterwards acquired is, as to such stock in trade, only a contract to assign and the vendee takes only an equitable title. Such vendee cannot maintain trover for the property against a *bona fide* pledgee, who received such goods from the vendor in the ordinary course of business.

In the absence of anything to lead the pledgee to believe a bill of sale existed, he is not chargeable with constructive notice by reason of his failure to inquire if there was such a registered bill of sale.

APPEAL of the defendant from the judgment of HUDDLESTONE, J. B., at trial, in an action to recover £171*l.* for the detinue and conversion of certain jewelry which the plaintiff claimed under a bill of sale.

By a duly registered bill of sale, dated February 3d 1881, F. Manning, by way of security for certain money due from him to the plaintiff, assigned to the plaintiff the goodwill and interest of his business, the said F. Manning, in the business of a gold and silversmith, carried on by him at a certain shop in Worcester, and also all the stock-in-trade in or about or belonging to the premises, and also all the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises or be appropriated to the use thereof, either in addition to, or in substitution

for, the stock-in-trade then being thereon or belonging thereto. It was provided that Manning should not, whilst in possession, remove the chattels from the premises without the consent of the plaintiff. The deed also contained a declaration that all future property thereinafore assigned should be subject to the security thereby made, and the powers, covenants, and provisions thereinbefore contained, although the same or any part thereof might not be capable of passing at law by the assignment thereinbefore contained.

Manning pledged with the defendant, a pawnbroker at Birmingham, certain jewelry which had been brought on to the business premises as stock-in-trade after the date of the bill of sale. The defendant received the pledge in the ordinary course of business and without actual notice of the bill of sale.

At the trial of an action by the plaintiff to recover the jewelry or its value from the defendant, HUDDLESTON, B., gave judgment for the plaintiff for 171*l.*, to be reduced to one shilling on the goods being returned to the plaintiff. The defendant appealed.

Jelf, Q. C., and *Clay*, for the appellant.

A. T. Lawrence, and *Darling*, for the respondent.

BRETT, M. R., after stating the facts, said—It was argued for the plaintiff that the bill of sale gave him the legal property in the after-acquired goods whenever they should come into the possession of Manning on the premises. For the defendant it was argued that the bill of sale only gave the plaintiff an equitable property in the goods. It was ingeniously argued for the plaintiff that the bill of sale was equivalent at law to a contract on the part of Manning that when any goods should come on to his premises for his business they should become the legal property of the plaintiff, and the case was likened to a contract of purchase and sale of unspecific goods, where the property does not pass at the moment of the contract, but when the goods are appropriated. Let us see what the law is. For a long series of years, where a bill of sale has assumed to assign future property to come upon the premises of the grantor, it has been held by the common-law courts that that assignment does not pass the legal property in the goods, even when they have come on to the premises. The courts of equity have always held that, in those circumstances, when the goods have come upon the premises, the interest of the assignee under the bill of sale is not a

legal, but only an equitable, interest. Therefore the case is decided by authority. The interpretation in equity was that the document was considered as equivalent to a contract that, when the goods should be acquired, then there should be an equitable property in them. It was equivalent to a contract. They said that it was to be supposed that the parties intended that there should be a mortgage security, and that the court should say that it was an equitable contract that, when the goods should come into possession, there should be an equitable property in them. It seems to me that the language of JESSEL, M. R., in *Collyer v. Isaacs*, is exceedingly plain, and that, according to ordinary interpretation, it means what I have stated. He says, "The creditor had a mortgage security on existing chattels, and the benefit of what was, in form, an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot create equity, any more than at law"—he does not say "make a contract," but—"assign what has no existence. Any man can enter into a contract to assign property which is to come into existence in the future, and, when it has come into existence, equity, treating the contract as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The contract is the governing thing there, and the clear meaning is that the contract becomes a complete assignment in equity and not at law.

It follows, therefore, that the interest of the plaintiff in the goods, even after they had come into the possession of Manning, was only an equitable interest. The legal interest—*i. e.*, the legal property—was in Manning. Therefore Manning, having the legal property, takes that property which at common law is not subject to a mortgage and pledges it for an advance of money. The right of the plaintiff in England as to goods which are the legal property of the plaintiff is not an equitable, but a legal right. It is a legal right, to be enforced by legal remedies. Therefore, the title of the defendant is a legal right—that of the plaintiff is only an equitable interest. In those circumstances the plaintiff could not maintain against the defendant the legal remedy of trover and detinue.

It was suggested that the defendant was not to be considered a *bona fide* purchaser, because, if he had inquired, he would have learned the position of Manning. That is a far-fetched argument.

for which there is no foundation. There was another point made for the defendant. It was said that Manning was an agent for sale within the meaning of the Factors Acts. The answer is that such an agent is one who is selling for a principal; but, according to the circumstances of this case, Manning was to sell for himself, and not for a principal. The plaintiff fails here because the defendant, as against him, has a superior right.

COTTON, L. J.—In this case the action was to recover certain jewelry which had been pledged by one Manning to the defendant. At the time of the pledge Manning had granted to the plaintiff a bill of sale, which comprised, not only the stock-in-trade then belonging to Manning, but also all stock-in-trade which should be afterwards acquired by him. The only question is as regards stock which was not then the property of Manning, but was afterwards acquired by him, and brought to his shop. The first question is whether, by virtue of that bill of sale, the plaintiff acquired any legal property in that after-acquired stock-in-trade. The case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, decided (though with considerable doubt among those members of the House of Lords who had been trained in the common-law courts) that in equity, when there was an assignment for value of property not then belonging to the assignor, there was an implied obligation on his part to convey the property when it was sufficiently identified. Then, as equity considers that what a man has bound himself to do must be considered as effectual as if it has been done, there is, therefore, in equity an assignment of the after-acquired property. But it was there laid down in terms that in law such an assignment would be of no effect, the doctrine of the common-law courts being that an assignment of property not in existence is null and void, but that in equity such an assignment, if for value, was a good equitable assignment. That was not only recognised in *Holroyd v. Marshall*, but also in *Lunn v. Thornton*, 1 C. B. 379, which was very like the present case, as an assignment of future property. The Judicature Act has not swept away such distinctions. It has often to be said that the primary object of the act was to enable all courts to recognise all rights whether legal or equitable, and not to treat legal and equitable rights as the same, but that though at law equitable rights ought to be effectual, yet that effect should be given to legal rights where they were to pre-

vail. By section 25 (11), "Generally, in all matters not here before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." To see the effect of that the previous parts of the section must be looked at. But it is merely necessary here to look at sub-section 10, which says, "In questions relating to the custody and education of infants the rules of equity shall prevail." In my opinion sub-section 11 was not intended to alter the effect in law of an assignment as it previously stood, but simply to say that the court in administering rights in law and equity should adopt the rules of equity, and not to say that an assignment previously inoperative at common law should be considered to be operative. I re-stated though I have already stated it, perhaps in other words, in *Went v. Matthews*, 11 Q. B. Div. 808. That being so, this purporting to assign after-acquired property, in my opinion, gives the assignee only an equitable title in such property. But I have said that there may be a contract that, on certain things being done, the property when selected should become the property of the assignee. But the contract here is a contract which purports to do that which the common law says cannot be done, and the common law, not adopting the principles of equity, says that it shall be void.

That being so, the conclusion is that, as regards the particular chattels in question, the plaintiff has only an equitable title. The legal title remained in Manning subject to his contract with the plaintiff. Equity does not deprive a person of the benefit of his legal title unless there is some equity against it, and he has no notice of the existence of a prior equity. The question is whether it can be shown that the defendant had notice of the equitable right of the plaintiff. There is nothing in the evidence to lead to that conclusion. All that could be said was that here was a man pledging stock-in-trade and that the defendant ought to have inquired whether there was a bill of sale. In my opinion that was not right. If there had been anything to lead a reasonable man to suppose that there was a bill of sale, then, if he had not made the usual search, he would suffer accordingly. To accede to the argument would be to carry the doctrine of constructive notice to an absurd extent. I shall not extend that doctrine, which I think has gone far enough, if not too far. There was nothing here to lead the defendant

suspect that there was a bill of sale protecting these chattels. The appeal, therefore, must succeed. Possibly a distinction must be drawn between a legal and an equitable title, but HUDDLESTON, B., relied upon the case of *Lazarus v. Andrade*, 5 C. P. D. 318, before LOPES, J. That decision was right, because the question there was between an execution creditor and the person entitled to the equitable interest in the property, and an execution creditor does not stand in the same position as the defendant here. But LOPES, J., did refer to the Judicature Acts as giving a legal effect to assignments which are only available in equity. Therefore, so far as HUDDLESTON, B., relied upon an expression of opinion by LOPES, J., our decision shows that that expression is not in accordance with the law.

LINDLEY, L. J.—I am also of the same opinion. The plaintiff must establish either—first, that the legal title was in himself, or, secondly, that he had an equitable title in the goods, and that the defendant had notice of it when he acquired the goods. As to the first point, I confess that I cannot see how it has been made out consistently with the authorities. The clause at the end of the deed shows that the plaintiff knew that he had not got a legal title. The operation of the deed was to transfer the legal property in the existing stock-in-trade, but an equitable title in that to be acquired afterwards. The plaintiff has an equitable title, and he can only deprive the defendant of his title by showing that the defendant had prior notice of the equitable title. The doctrine of constructive notice has not been carried so far as was suggested. It appears to me that our conclusion must be that the appeal must be allowed, and that judgment must be entered for the defendant with costs.

Appeal allowed.

The American law is quite well settled, in accord with *Joseph v. Lyons*, that a bill of sale or mortgage, cannot, of itself, and without any new act of appropriation or ratification by either party, operate to transfer the legal title of personal property not then owned by the grantor, and in which he then has no actual or "potential" interest, even though its future acquisition be then contemplated by both parties; *Jones v. Richardson*, 10 Met. 481 (a very important case on this

point); *Low v. Pew*, 108 Mass. 347; *Codman v. Freeman*, 3 Cush. 306; *Chesley v. Josselyn*, 7 Gray 489; *Head v. Goodwin*, 37 Me. 181; *Griffith v. Douglass*, 73 Id. 532; *Chapin v. Cram*, 40 Id. 561; *Pierce v. Emery*, 32 N. H. 505; *Cook v. Cortell*, 11 R. I. 482; *Williams v. Briggs*, 11 Id. 476; *Otis v. Sill*, 8 Barb. 102; *Farmers' Loan Co. v. Long Beach Impr. Co.*, 27 Hun 89; *Gardner v. McEwen*, 19 N. Y. 123; *Looker v. Peckwell*, 38 N. J. Law 253;

Rose v. Bevan, 10 Md. 466; *Wilson v. Wilson*, 37 Id. 1; *Cheapman v. Weimer*, 4 Ohio St. 481; *Comstock v. Scales*, 7 Wis. 159; *Hunter v. Bosworth*, 43 Id. 583; *Hunt v. Bullock*, 23 Ill. 320; *Roy v. Goings*, 96 Id. 361; and many other cases.

And this seems to be so even though such bill of sale or mortgage specifically describes the property intended to be subsequently acquired; for the reason is equally valid that a person cannot convey what he does not then own, whether specified or not; and it is quite generally agreed that his efforts to do so by expressly stating in his bill of sale or mortgage that the same shall apply to and include after-acquired property, either in addition to or substitution for that which is owned at the time, is entirely ineffectual in a court of law: *Moody v. Wright*, 13 Met. 17; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Id. 306; *Griffith v. Douglass*, 73 Me. 532; *Hamilton v. Rogers*, 8 Md. 301; *Wright v. Bircher*, 5 Mo. App. 322; *Parker v. Jacobs*, 14 So. C. 112; and some other cases.

And most courts apply this rule not only in favor of subsequent innocent purchasers or mortgagees from the same grantor after he has acquired the additional property, but also to his attaching creditors who have duly taken the same by legal process against the grantor, after the goods have come into his ownership and possession.

In some courts a second mortgagee or purchaser, with actual notice of a prior mortgage or bill of sale purporting to convey the after-acquired property included in such second conveyance, is held to be affected by such notice, and not to take a good title as against the first: *American Cigar Co. v. Foster*, 36 Mich. 368; *Robson v. Michigan Central Railroad*, 37 Id. 70; *McGee v. Fitzer*, 37 Tex. 27; and some others.

But the mere registry of a prior mortgage, as held in the principal case, has

been held not to affect a subsequent mortgagee, in good faith with constructive notice of the prior mortgage: *J. v. Richardson*, 10 Met. 493; *Singh v. Phelps*, 20 Wis. 398; *Mowry v. W.* 21 Id. 417; and it is not easy to see why actual knowledge of a prior mortgage, invalid as to third persons, so far as it applies to unowned property, should change a rule of law and make it valid against a subsequent mortgagee or creditor who takes it from the possession of the owner before any act of appropriation of it under the former mortgage.

But this rule against a valid sale or mortgage of property not then owned by the mortgagor or vendor, does not prevail, even at law, in two classes of cases. One is where, after the acquisition of such included future property, some efficient act of appropriation thereof has taken place between the vendor and vendee, or mortgagor and mortgagee. Before the rights of any third person are attached, in such cases, the first title becomes complete and valid. Thus, a mortgage expressly includes property then owned but expected to be acquired, and after such acquisition the mortgagor actually delivers the same into the possession of the mortgagee, or if the latter, more especially under a clause in the mortgage authorizing it, has seized and actually taken possession of the same before any subsequent mortgage, attachment, or seizure on execution has been made, the party claiming under this latter title can not object to the original invalidity of the first mortgage, but the first title will become perfect at least from and after the time of such appropriation: *Bac. Max. Reg. Congreve v. Evetts*, 10 Exch. 298; *v. Hayley*, 5 El. & Bl. 830; *Canfield v. Allatt*, 3 H. & N. 964; *Rowley v. J.* 11 Met. 333; *Cook v. Corthell*, 11 Met. 482; *Moody v. Wright*, 13 Met. 17; *Brown v. Webb*, 20 Ohio 389; *Tilton v. Mabee*, 25 Ill. 257; *Chynoweth v. T.* 10 Wis. 397; *Booker v. Jones*, 55

266; *Chase v. Denny*, 130 Mass. 566; and many other cases.

The other class of cases is where one has at the time of his sale or mortgage, a potential, inchoate, or embryo interest in the property mentioned, which subsequently ripens into a complete and perfect interest; and then the title vests in the first grantee as against third persons, even though the property has much changed or developed, and increased in value since the first sale or mortgage thereof. This is familiar law since the days of Chief Justice HOBART: *Grantham v. Hawley*, Hob. 132. Therefore, the owner of sheep may sell the next year's growth of wool; or of a herd of cows the next season's milk, or butter; the owner or lessee of land, the future artificial crops, &c.: *Cayce v. Stovall*, 50 Miss. 396; *White v. Thomas*, 52 Id. 49; *Thrash v. Bennett*, 57 Ala. 156; *Stearns v. Gafford*, 56 Id. 544; *Jones v. Webster*, 48 Id. 109; *Butler v. Hill*, 1 Baxter (Tenn.) 375; *Stephens v. Tucker*, 55 Ga. 543; s. c. 58, Id. 391; *Cook v. Steel*, 42 Tex. 53; *McGee v. Fitzer*, 37 Id. 27; *Moore v. Byrum*, 10 So. C. 452; and many others.

This last is more obvious where the crop has been in fact planted when the mortgage or sale thereof is made; as in *Cotten v. Willoughby*, 83 N. C. 75; but many courts hold this not essential,

and declare that if the mortgagor owns or has a lease of the land on which the crop is to be raised, he may by apt terms make a valid mortgage of an unplanted crop therefrom: *Argues v. Wasson*, 51 Cal. 620; *Van Hoozer v. Cory*, 34 Barb. 12; *Conderman v. Smith*, 41 Id. 404; *Watkins v. Wyatt*, 9 Baxt. 250. Though in the absence of statute this extension of the law of potential existence is not everywhere approved. See *Tomlinson v. Greenfield*, 31 Ark. 557; *Hutchinson v. Ford*, 9 Bush 318; *Redd v. Burrus*, 58 Geo. 574.

But notwithstanding the substantial uniformity of the decisions as to the general rule involved, in the principal case, and when only the legal title is involved, as between successive purchasers or mortgagees, yet there is a class of cases following *Holroyd v. Marshall*, in which in a court of equity the rights of the first mortgagee or grantee will be protected, as against certain parties claiming the same after-acquired property by a succeeding conveyance from the same grantor: *Mitchell v. Winslow*, 2 Story 644; *Beale v. White*, 94 U. S. 382; *Brett v. Carter*, 2 Low. 458; *McCaffrey v. Woodin*, 65 N. Y. 459. But even this is not uniformly assented to.

EDMUND H. BENNETT.

Boston, April 1st 1885.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

BOYD v. CONKLIN.

A rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with surface water, that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that had always been on his premises, and of getting rid of the inflow.

The maxim "*Sic utere tuo alienum non laedas*" applied.

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ERROR to Lenawee.

A. L. Millard and Bean & Underwood, for plaintiff.

Merritt & Wooden and C. A. Stacy, for defendants.

CAMPBELL, J.—Boyd sued defendants for removing part of a dam which he had built across the outlet which drained an adjoining highway and higher lands adjacent. Lorenzo D. Dewey owns a farm running north of the highway about half a mile, and a swale ran through this land from north to south, which crossed the road through a culvert, from which the water flowed across Boyd's farm to a pond on his land which has no surface outlet. The swale is crossed by an old beaver dam near its north end, and a creek called Evans's creek, a little to the north of it, sometimes overflows, so that the water runs over this beaver dam into the swale. The swale carries down all the surface water on Dewey's land, and there was testimony tending to show that it was supplied by springs, although this was disputed. Both farms are inclosed by a ridge, which prevents any water passing from Dewey's land from escaping except through the swale and into the pond, and there is no other way of draining the highway. The soil is clay, except to the south and east of the pond, where it is gravelly and where there is some escape of water by percolation, and possibly by a subterranean outlet.

Both farms seem to have been in private hands for above twenty years. The road appears, by the testimony, to be the La Plaisance Bay Turnpike, which was, as we are judicially informed by public statute, laid out in 1832, and built by the United States government, and subsequently became subject to state authority, and is now in charge of the ordinary town authorities. Just north of the road (which runs east and west on the section line between sections 32 and 29, in township 5 S., of range 4 E.) the swale widens on Dewey's land into a small pond. The pond on Boyd's land is never dry, and before he built the dam contained usually from 10 to 12 acres, of which a space of several acres became dried by means of the exclusion of the water which came down from the lands above, which had no other escape. The dam was a solid structure 12 feet thick at the base and 7 feet in the top, about a hundred paces long, and higher than the highest part of the culvert in the highway. Its effect was to submerge the road, and also to th

the water all back over the highway and upon Dewey, where it had no escape but by evaporation.

Boyd purchased the farm, which contains a little over 90 acres, in 1872, at which time there was no obstruction to the flowage. He first built the dam in 1877, and it was removed, so as to give room for the water, in 1878 by the highway commissioner. Being rebuilt, it was removed in 1879 by defendants, under the direction of the local authorities: Conklin himself being commissioner, and acting in pursuance of their instructions. The case, as it is now before us, presents no complications. The dam was built for the sole and express purpose of shutting out the water, which had its only outlet through the swale and over Boyd's land, and this was its original and natural outlet. It was not artificial, but had always existed since the country was known; and the existence of a beaver dam makes it not unlikely that it was once a running stream. Whether its waters are, to any extent, from spring or not, they include the whole surface drainage, and are not confined to passing storms. There is some testimony of occasional attempts by the lower owners to obstruct the water, but no evidence of acquiescence, and very little, if any, of submission by the highway authorities to such obstructions.

If this had been an artificial drainage, the long existence of the road, which could not be kept in repair without drainage, and the undisputed fact that a regular culvert has existed at least since 1845, and that no other drainage was possible, would, in our opinion, put plaintiff to very strong proof to overthrow the presumption of right. The court below gave plaintiff the benefit of that analogy, and, going very far in the endeavor to avoid giving occasion for cavil, limited defendant's justification to a substantially uninterrupted enjoyment of the drainage for twenty years, without substantial objection to the public or highway authorities. But plaintiff insists that his right to intercept surface water cannot be cut off in that way, and that, except in case of living waters in a defined and regular channel, there is no such obstacle, or none without such an undisputed prescriptive right as would be equivalent to a grant.

On the argument the whole subject was discussed with much ability. It is not necessary, however, to consider any more of the legal theories than such as have some application on the facts. The real question here was whether one land-owner can, at his

pleasure, erect such barriers as will flood his neighbor's land with water that otherwise would escape over his own, in order to partially or wholly reclaim the bed of a pond which has always existed there, and get rid of the inflow. In its natural condition neither the highway nor the upper lands would be drowned. The object of the dam is to cover portions of them with water that cannot escape.

It was urged strenuously on plaintiff's behalf that there is a radical difference between the common and the civil law upon the subject of the relations of upper and lower estates as to easements and servitudes, and that at common law the latter afford no service to the former in regard to the flow of surface water. We are not expected, officially, to be experts in the civil law, and shall not attempt to discuss that department of jurisprudence as a separate subject. But it so happens that from the time of Bracton down attention has been frequently called by the common-law courts to the fact that the whole subject of rights in water has been defined by the civil law writers in terms which substantially agree with the recognised rules of the common law, and that the two agree very closely, not necessarily because one has been borrowed from the other, but rather because both are naturally drawn from the general usages and necessities of mankind.

All of the considerations which belong to the present case depend on the reciprocal action on both upper and lower estates of the maxim that every man, in the use of his own property, must avoid injuring his neighbor's property as far as possible. And while the cases cited on the hearing show that courts have sometimes indulged in sweeping language that, taken independently, would lead to remarkable results, the facts on which the apparently conflicting rulings rest greatly narrow their substantial repugnance. There are, it must be admitted, decisions that cannot possibly be harmonized; but their number and their force do not equal their apparent importance. And there is no subject on which the usages have had so much weight in shaping the local common law as the incidents of real estate. There are parts of the United States where the land laws have always differed from the common law of other states, while the law relating to water has been laid down in a large part of the United States, in a uniform manner, with reference to their ancient condition as French, Spanish or English colonies. The civil-law definitions, or what are supposed to

such, are quoted as often under the one class of antecedents as under the other.

The chief differences pointed out on the argument as important in weighing decisions as furnishing precedents, related to distinctions between living streams in a natural flow and water of a different character in artificial escapes or in surface descents—to distinctions between urban and rural servitudes—and to the purposes for which dams or other interruptions are made. It is not disputed that perennial flowing streams of living water impose similar duties, and confer similar rights on all riparian proprietors under all systems of jurisprudence. It is not disputed that under what is claimed to have been the civil-law rule, the rural proprietor of lower lands was required to receive the water flow of surface water from the upper lands coming in substantially its natural amount and condition. Beyond this we cannot harmonize much of the contention of counsel, and must dispose of the case as it appears to us. A number of the most striking cases cited by plaintiff's counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these it was claimed that there was no substantial foundation for any distinction between urban and rural property.

There is no question but that such a distinction is recognised in the civil-law authorities referred to on the argument, as well as in several of the cases cited. The distinction is one of substance, and not arbitrary. As already suggested, the adjoining owners owe mutual duties—the one to receive the natural flow, and the other not to injuriously change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface water. Grades must usually be established for streets and sidewalks and pavements, and other surface changes are usual, in addition to the walls of buildings, which, with their embankments, must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially. And where the same rule has been applied to towns as to the coun-

try, it has, in some cases, at least, been done expressly because of the circumstances of the record the particular land in question remained under rural conditions. If, as seems to be true, the decisions ignore the distinction, they depart from the old rule which cannot be maintained as harmonious with the general law and authority, unless on special facts which do not justify their *dicta*.

The Massachusetts cases lay down so broadly the right of the lower proprietor to cut off the water flowing down on him that whatever distinction may be found in their facts, the court evidently meant to disregard them. The Wisconsin cases perhaps about as far, and the Indiana rule is stated in similar terms. It can hardly be said that there is any fixed New York rule which would apply to such a case as the present. In the case of *Beasly v. Wilcox*, 86 N. Y. 140, where the interference with the water was by building and banking up a house near a street, the facts do not call for any very general discussion, and the court, while expressing a preference for the views of the Massachusetts courts over the rule in Pennsylvania and other states to the contrary, saw the necessity of caution in adopting those views too universally, and left the door open to deal with cases like this on their own footing. In *Bowlsby v. Speer*, 2 Vroom (N. J.) 351, the facts and the decision were like those in *Barkley v. Wilcox*, but can hardly be said to disturb the earlier case of *Earl v. De Hart*, 1 Beasly 280, where the civil-law principle was treated as in some cases furnishing the proper rule for town property which was not so situated as to require a different treatment.

Mr. Washburn, in his treatise on Easements, p. 355, indicates that the Massachusetts rule is not sustained by the weight of American authority, and that the rule known as the civil-law rule has been more generally accepted. He cites most of the authorities brought to our attention on the argument, and they unquestionably sustain the existence of duties between the respective landowners which do no harm to each other against the natural servitude. Much of the discussion found in the cases referred to turns, not on the right of the upper owner to have egress for his water, but upon the right of the lower owner to have the water come down. In the present case, Boyd does not seem to desire this supply. It is quite supposable that, if this pond were not entirely on

premises, it might be of some importance to the neighboring land that it should not be diminished or destroyed.

It is not necessary on this record to determine how far defendants could themselves have shut off the supply, because it is evidently not for their interest to do so. But there is no lack of cases which hold that rights may exist in a flow of water which is not a natural living stream. And while here, as in other cases, the rights of parties must depend somewhat on the circumstances and surroundings, the general principle underlying all the cases is that the upper and lower owners must respect any valuable rights which accrue to either from the position of their lands. The narrow definition of water-courses as natural living streams, which appears in a few cases in the United States, is not an ancient or universal definition. On the contrary, water running in a natural or artificial bed is very frequently, if not generally, so regarded. But names are of small importance, inasmuch as the only consideration that need be looked at is the character and surroundings of the flowage. The following authorities recognise valuable rights in water, and some of them are spoken of expressly as watercourses, which are entirely distinct from natural living streams: *Woolr. Wat.* 3, 146, 147; *Wright v. Williams*, 1 Mees. & W. 77; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramsbotham*, Id. 602; *Beeston v. Weate*, 5 El. & Bl. 986; *Ivimey v. Stocker*, L. R., 1 Ch. App. 396; *Watts v. Kelson*, L. R., 6 Ch. App. 166; *Nuttall v. Bracewell*, L. R., 2 Exch. 1; *Holker v. Pott*, L. R., 8 Exch. 107; *Taylor v. Corp. of St. Helena*, 6 Ch. Div. 264; *Magor v. Chadwick*, 11 Ad. & E. 571; *Chadwick v. Marsden*, L. R., 2 Exch. 284.

Upon such questions as are raised on this record there is, except in the Massachusetts doctrine and the cases which have followed it, very little conflict of opinion. Whatever may be the rights of adjoining proprietors as to the use and diversion of water, there is no right in any one, by raising artificial obstructions, to flood his neighbors' lands by stopping the escape of water that cannot escape otherwise. Some cases have intimated that there might be larger rights of obstruction where the particular drainage was not necessary. But actual mischief done as a natural and necessary consequence of such erections is almost universally treated as an actionable nuisance: *Lawrence v. G. N. Railroad Co.*, 16 Q. B. 643; *Rylands v. Fletcher*, L. R., 3 H. L. 330; *Tootle v. Clifton*,

22 Ohio St. 247; Wood, Nuis. § 386; *Hurdman v. N. E. Railroad Co.*, 3 C. P. Div. 168; *Whalley v. Lancashire & Y. Railway Co.*, Eng. Ct. App. March 1884, (523 Am. Law. Reg. N. S.) 53; *Brodie v. Saillard*, 2 Ch. Div. 692; *Gilham v. Madison Railway Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 Id. 18; *Ogburn v. Connor*, 46 Cal. 346; *Butler v. Peck*, 16 Ohio 334; *Nevins v. City of Peoria*, 41 Ill. 502; *Livingston v. McDald*, 21 Iowa 160; *Hooper v. Wilkinson*, 15 La. Ann. 49; *McCormick v. Kansas City Railroad*, 70 Mo. 359; *Shain Kansas City Railway*, 71 Id. 237.

As previously suggested, the rights of upper and lower owners are not treated by the common-law authorities as peculiar to either common or civil law, but as natural incidents to the land, which are and must be analogous, as governed by universal jurisprudence except where specially modified. The English courts have never hesitated to cite the civilians on such questions, and they have decided cases arising out of England without attempting to inquire into any local law as the basis of decision. Thus, in the English Indian case of *Ramesur Pershad Narain Singh v. Koonj Beha Pattuk*, 4 App. Cas. 121, the rights of the parties were decided with just as if they had arisen in England, although the uses of tanks and reservoirs in India must, in all probability, have grown into very ancient customs. In *Smith v. Kenrick*, 7 C. B. 51, the Digest was cited as authority. In *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, and in *Embrey v. Owen*, 6 Ex. 353, it is stated that these various rights are not to be regarded as based on any presumption of grants, but as incident to property *jure naturæ*.

Bracton is cited in Wood, Nuis. § 386, as coinciding with the civil-law rule. While he has been regarded as drawing too much from the Roman law in some other matters, no one has doubted that he laid down the common law correctly on this. Britton laid it down very clearly that no one can drown his neighbor's land erections on his own soil. "Appurtenances," fol. 140. The civil-law rule was recognised and adopted in the customary as well as the written law, in parts of France, and in Canada and Scotland, and the Roman law in all these regions was modified by local usage, and in many things repudiated. In Basuage's Commentary on the Customs of Normandy it is not treated as a civil-law rule, but as a law of nature. 2 Basuage 565. In *Frechette v. La Compagnie*

Manufacturiere de St. Hyacinthe, L. R., 9 App. Cas. 170, the Lower Canada Code is quoted, which seems to be a substantial if not a literal transcript of section 640 of the French Civil Code, and regulates the rights of both classes of owners, forbidding the lower owner from hindering the escape of water by dykes, and forbidding the upper owner from aggravating the flow to the injury of the lower estate. In discussing this clause, a learned writer on the law of property, Charles Compté, speaks of the term "servitude," which strictly denotes a diminution of rights, as an unfortunate and improper phrase to apply to these reciprocal duties. "It is simply a means of preventing usurpation, and of securing to each that which belongs to him." While Erskine, in his "Principles of the Law of Scotland," uses the term "servitude" as including the rights in question, he speaks of them as natural, as contradistinguished from legal servitudes. Book 2, tit. 9. Domat refers to them in the same way, dividing servitudes into those which are natural, and those which do not rest on natural right. Book 1, tit. 12, § 5. And this is further illustrated by his collection of excerpts from the Roman law. 4 Domat, 423.

There seems to be no reason for attempting to draw distinctions between the civil and the common law on this subject. The authorities recognise the principles as in no sense conventional, or derived from any school of jurisprudence, but as resting on the immunity of one man's property from injury by another in violation of natural justice, and in disregard of the relative conditions arising from its position. Each may do in using his own what is consistent with the fair interests of the other.

The escape of water in the present case is natural and is necessary, and there was no right to prevent it by such a dam as defendants broke through. The charge given was at least as liberal as plaintiff had a right to ask. The judgment should be affirmed.

CHAMPLIN and SHERWOOD, JJ., concurred.

COOLEY, C. J., did not sit.

DEFINITION OF A STREAM.—Before discussing the subject of "surface-water," it is well to have a clear understanding what is meant by the use of that term. It is clear that surface-water is not a watercourse, and with that it is most likely to be confounded.

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In *Luther v. Winnisimmet*, 9 Cush. 174, a watercourse is defined as "a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water." "A watercourse consists of bed, banks and

water; yet the water need not flow continually; and there are many water-courses which are sometimes dry:" *Eryer v. Warne*, 29 Wis. 515; see *Eulrich v. Richter*, 41 Wis. 318. In Indiana, after defining a watercourse in the language given, the court said: "There must, however, always be substantial indication of the existence of a stream, which is ordinarily and most frequently a moving body of water:" *Weis v. City of Madison*, 75 Ind. 253.

In New Jersey it was said: "A channel or canal for the conveyance of water, particularly in draining lands. It may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in the case of a ditch, or other artificial means, used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land." *Earl v. De Hart*, 1 Beasley Ch. 285.

EXAMPLE.—From time immemorial a natural stream of water had flowed from a southerly direction across a road and upon the defendant's land, and thence taking a northwesterly course. A part of the way across the defendant's land it ran in a well-defined channel, but when it reached a point within five rods of the plaintiff's adjoining land, the water spread out over the surface of the ground, covering a space a few rods in width, and so ran upon and across the plaintiff's land, which was a level meadow, and irrigating it in a valuable manner, through its whole length, about seven rods, and thence on to other land of other owners beyond. Over the surface of the defendant's land there was no defined channel, nor through the whole length of the plaintiff's land, and not until a short distance beyond the plaintiff's land, where it again formed a small brook, and ran off in a westerly direction to a river.

In an action by the plaintiff for div. this brook from his land, it was "that the brook did not cease to be a natural watercourse on the plaintiff's land, and that he could maintain an action:" *Macomber v. Goffre*, 101 Mass. 219. For further examples see *Gillett v. Johnson*, 30 Conn. 180; *Brown v. Wilcox*, 86 N. Y. 140; s. c. 40 N. Y. Rep. 519; *Little Rock, etc., Ry. v. Chapman*, 39 Ark. 463; s. c. 43 Ark. Rep. 280; *Hebron Gravel Road v. Hurvey*, 90 Ind. 192.

TWO LINES OF CASES.—As in the principal case, there are two lines of cases, following two distinct rules, the common-law rule and the civil-law rule.

THE COMMON-LAW RULE.—The first case asserting the common-law rule is *Luther v. Winnisimmet*, 2 Cush. 185 (1851). In that case the defendant caused an additional flow of water to run over the plaintiff's land, by filling up his lot. The court charged the jury: "If there was a watercourse or stream of water running through the land conveyed, the right to the continued use thereof would pass to the plaintiff by the deed, as a parcel of his grant; if there was no such watercourse or stream of water the plaintiff could not claim a right of drainage or flow of water off his land upon and through the defendant's land, merely because the plaintiff's land was higher than the defendant's and sloped toward it, so that the water which fell in rain upon it would naturally run over the surface in that direction, and the charge was held strictly correct."

In a New York case is a dictum which has been cited so often, and its state so unqualifiedly endorsed, that it has all the weight of an authority. *Fortiori* one is not obliged to excavate ditches or construct sewers on his land for the purpose of draining the marshy lands of an adjoining proprietor. And in respect to the runoff of surface-water by rain or snow

know of no principle which will prevent the owner of land from filling up the wet and marshy place on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface." *Goodale v. Tuttle*, 29 N. Y. 459, 466.

In another Massachusetts case it was said: "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing upon it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into or over the same in greater quantities or in other direction than they were accustomed to flow." Again: "the obstruction of surface-water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil": *Gannon v. Hargaden*, 10 Allen 106.

It, therefore, follows from the reasoning of these cases—which is sustained by many authorities—that the owner of land may lawfully occupy and improve it in such manner as either to prevent water which accumulates elsewhere from coming upon it, as by erecting a wall, dyke or barrier, or to alter the course of the surface-water which falls upon it, or comes upon it from elsewhere; even though water is thereby made to flow upon the adjoining land of

another to his damage: *Bates v. Smith*, 100 Mass. 181; *Bowlsby v. Spear*, 81 N. J. L. 351; *Greatrex v. Haywood*, 8 Exch. 291; *Shields v. Arndt*, 3 Green Ch. 234; *Barkley v. Wilcox*, 86 N. Y. 140; s. c. 40 Am. Rep. 519; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Lynch v. Mayor, etc.*, 76 Id. 60; s. c. 32 Am. Rep. 271; s. c. 38 Id. 753; s. c. 5 Am. & Eng. R. R. Cas. 82; *Cairo & Vincennes Rd. Co. v. Stevens*, 73 Ind. 278; s. c. 38 Am. Rep. 139; s. c. 5 Am. & Eng. R. R. Cas. 58; *Beard v. Murphy*, 37 Vt. 104; *Buffam v. Harris*, 5 R. I. 253; *Wadsworth v. Tillotson*, 15 Conn. 366; *Atchinson, &c., Rd. Co. v. Hammer*, 22 Kan. 763; s. c. 31 Am. Rep. 216; *Schlichter v. Phillipy*, 67 Ind. 201; *Hogenson v. St. Paul, &c., Ry. Co.*, 31 Minn. 224; see *O'Brien v. City of St. Paul*, 25 Minn. 331.

So a complaint charging the obstruction of a watercourse is not sustained by proof of a flow, though through a ditch, of water which has accumulated from rains or melting snow: *Dickinson v. Worcester*, 7 Allen 19; *Ashley v. Wolcott*, 11 Cush. 192; *Munkres v. Kansas City, &c., Rd. Co.*, 60 Mo. 334.

The owner of land adjoining a highway may throw up an embankment to prevent the water overflowing his premises where it comes from such highway. Thus where a highway had been laid out for forty years, up a steep hill-side, over which large quantities of surface-water usually flowed down on the upper side of the highway; and a culvert was built by the proper authorities across the highway, extending to the inside of the wall between the highway and the defendant's land, a portion of the wall having been removed for that purpose; and a light trench was dug from the mouth of the culvert, two or three feet in length, into defendant's land to carry the water off, it was held that the defendant might stop up so much of the culvert as was under his wall, even though it had the effect to cause the water to flow over the highway

and injure the travelled road: *Inhabitants of Franklin v. Fisk*, 13 Allen 211.

In case of a railway corporation taking land for a right of way, it is held that it is proper to take into consideration the lay of the land and the flow of water in percolating through the land: *Pfleyer v. Hastings and Dakota Railroad Co.*, 5 Amer. & Eng. Railroad Cases 85; *Waterman v. Conn. R. Railroad Co.*, 30 Vt. 610. See *Morrison v. Bucksport Railroad Co.*, 67 Me. 353. See, also, *Walker v. Old Colony and Newport Railroad Co.*, 103 Mass. 10. So, in New York, it is held that commissioners in grading highways are not bound to provide a channel for drainage of surface-water: *Gould v. Booth*, 66 N. Y. 62.

The owner of the upper land may drain off the surface-water into an adjoining stream, even though it may increase the flow: *Waffe v. N. Y. Cent. Railroad Co.*, 58 Barb. 413, if such increase is reasonable: *McCormick v. Horan*, 81 N. Y. 86; s. c. 479 Am. Rep. 47.

So one may drain off his land even though it have the effect to reduce the supply of a stream where a mill is situated: *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, Id. 369. And the same is true of water percolating through soil beneath its surface: *Chasemore v. Richards*, 7 H. L. 374; s. c. 5 Jur. (N. S.) 873; 5 H. & N. 990 (Am. ed.). One cannot, however, foul the surface-water flowing over his land to another's: *Gowtry v. Leland*, 31 N. J. Eq. 385; and the same is true of water percolating beneath the surface of the soil: *Hudgkinson v. Ennor*, 9 Jur. (N. S.) 1152. See *Brown v. Illius*, 25 Conn. 583.

Water flowing from a hollow or ravine, only in time of rain or melting snows, it has been held in New York, is not, in contemplation of law, a water-course: *Wagner v. Long Island Railroad Co.*, 2 Hun 633. See *Earl v.*

DeHart, 1 Beas. 280. Yet, in England the contrary seems to have been held: *Gibbs v. Williams*, 25 Kars. 210; *Barnes v. Sabron*, 10 Nev. 218; *Hudson*, 27 Wis. 656.

Frequently the question arises whether the owner of the upper land acquires a right by prescription or adverse possession to flood his neighbor's lower and adjoining land. In Massachusetts it was held that no period less than twenty years was necessary to give the owner of the upper land a right to flood the land of the lower owner, both having derived title from the same grantor: *Luther v. Wimet*, 9 Cush. 171. See *Earl v. Leland*, *supra*. However, merely permitting surface-water to flow from the upper land to the lower land, when the two pieces of land are owned by different owners, is not sufficient to create a right to the continuation of the flowage by prescription or adverse usage. See 2 Am. L. & E. (N. S.) 72; *Prescott v. Whitcomb*, 342 (ditch); *Wood v. Wood*, 11 Exch. 778; *Greatrix v. Haywood*, 291; *Arkwright v. Bell*, 5 M. & W. 100; *Rawstron v. Taylor*, 11 Exch. 369; *Parks v. Newburyport*, 10 Gr. 100; *Fryer v. Warne*, 29 Wis. 511; *Worchester v. Worcester*, 7 Allen 19; *W. Chapin*, 12 Id. 516, 518.

Suppose the surface-water is directed off or backed up with a malicious design to injure an adjoining owner, is the liability incurred by reason of the design? If it is done under a legitimate claim of right and in good faith under the common law no liability attaches: *Hoyt v. Hudson*, 27 Wis. 656; s. c. 9 Am. Rep. 473; *Pettigrew v. Evansville*, 25 Wis. 223, 230; *Walker*, 34 Conn. 466; *Green v. Francis*, 18 Pick. 121; *Wheat v. Bough*, 25 Penn. St. 528; *Delhi v. Mont*, 50 Barb. 316; *Panton v. B. 17 Johns.* 92, 98; *Chasemore v. Richards*, 5 Jur. N. S. 873; s. c. 5 H. & N. 990; 7 H. L. 349. Yet it has been held that it is immaterial with what mo-

act is done, if it is otherwise lawful. *Chatfield v. Wilson*, 28 Vt. 49; see also *Frazier v. Brown*, 12 Ohio St. 294; *Clinton v. Myers*, 46 N. Y. 511; *Heald v. Carey*, 11 C. B. 993; *Brain v. Marshall*, 41 Law Times N. S., note; *Walker Cronin*, 107 Mass. 555; *Cooley on Torts* 688.

In *Curtiss v. Ayrault*, 47 N. Y. 73, the owner of a tract of land, upon which was a swamp, dug a ditch from it through another portion of the tract, making a permanent channel, in which the waters gathering in the marsh flowed in a continuous stream, mutually benefiting the lands drained, and the lands to which it conveyed a supply of good water, and, subsequently, while those reciprocal benefits and burdens existed, and were apparent, he divided the tract into parcels and conveyed the parcels to different grantees, who contracted with reference to the condition of the lands. After the sale of several parcels, it was held that the vendor could not change the ditch in any way, or refuse to permit the water to flow in the ditch, nor could the grantees in any way materially change the original relative condition of one parcel to the injury of another.

EXAMPLES.—The owner of a tract of land sued an adjoining owner for obstructing the passage of driftwood carried by the overflow of an adjacent water-course during a freshet, by planting a row of trees along the line dividing their lands, by means of which the driftwood was lodged upon the plaintiff's land. It was held that he had no cause of action: *Taylor v. Fickas*, 64 Ind. 167; s. c. 31 Amer. Rep. 114; 18 Am. Law Reg. (N. S.) 249.

A railroad corporation built a large embankment ten feet high, upon which to lay its tracks along its right of way, running across a low and swampy tract of land, and the embankment cut off the natural flow of the water percolating through the soil, and the flow of the water that came from a river, not far off,

in times of high water. The water falling upon the plaintiff's land, which lay some distance above the embankment, and that caused by the melting snow, was prevented from flowing off by reason of the water being heaped up on the land adjoining the embankment. It was held that the corporation was not liable to the plaintiff, by reason of his lands having been rendered unfit for cultivation, even though it was alleged that the plaintiff had lost several crops for that reason, and had sustained great damages which proper culverts placed under the embankment would have prevented: *Cairo and Vincennes Rd. v. Stevens*, 73 Ind. 278; see *Morrison v. Bucksport and Bangor Rd. Co.*, 67 Me. 353; *Atchison, &c., Rd. Co. v. Hammer*, 22 Kans. 763.

Plaintiff's field lay in an angle made by a railway crossing a highway. Previous to the construction of the railway the water falling upon the highway ran down the road, across where the railway was located, and thus running caused no injury to the plaintiff's land. After its construction the water, prevented by the embankment from flowing off, accumulated at the crossing and flowed back upon the land of the plaintiff. It was held that no cause of action lay against the railway corporation: *Wagner v. Long Island Rd. Co.*, 2 Hun 633; see *Wuffs v. N. Y. Cent. Rd. Co.*, 58 Barb. 413.

A railroad corporation, in constructing the road-bed, filled up an artificial ditch on the land of a third person, by which the surface-water was conducted from the plaintiff's premises to a river, and thus turned back the water upon the premises of such person. It was held to give no ground of action: *O'Conner v. Fond du Lac, etc., Rd. Co.*, 52 Wis. 526; s. c. 38 Amer. Rep. 753; 5 Amer. & Eng. Rd. Cas. 82.

THE CIVIL LAW RULE.—Of this rule Justice REDFIELD has said: "There seems to be nothing very definite in the civil-law writers upon this particular point, except that it is fully agreed in the

body of the Roman law (Dig. lib. 89, tit. iii. s. 12), that if one by digging on his own land, in good faith, and with no purpose of injuring his neighbor, nevertheless dry up his well by diverting the underground current from it, there is no remedy by action. * * * But the distinction between surface-water, accumulating in low places from the melting of snows in the spring, and that which had formed more or less permanent channels in the earth in its passage, would not be likely to attract the attention of writers in most of the European countries, and especially in Italy, where no snows ever cover the ground :” 11 Amer. L. Reg. p. 20.

DOMAT says (page 616 Cush. ed.): “Rainwater or other waters which have their course regulated from one ground to another, whether it be by nature, or by some regulation, or by title, or by ancient possession, the proprietor of said grounds cannot innovate anything, as to the ancient course of its waters ; thus he who has the upper grounds cannot change the course of the water, either by turning it some other way or rendering it more rapid, or making any other change in it to the prejudice of the owners of the lower grounds.”

One of the leading cases following this rule is *Martin v. Riddle*, reported in a note to *Kauffman v. Griesemer*, 26 Pa. St. 407, where the law is very well stated : “Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances ; hence, the owner of the lower ground has no right to erect embankments, whereby the natural flow of water from the upper ground shall be stopped ; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel

made on the lower ground ; nor can he collect into one channel water usually flowing off into his neighbor's fields by several channels, and thus increase the waste upon the lower fields.”

A number of states have adopted this rule : *Nininger v. Norwood*, 72 Ala. 277 ; s. c. 47 Amer. Rep. 412 ; *Hughes v. Anderson*, 68 Ala. 280 ; s. c. 44 Amer. Rep. 147 ; *Gilham v. Madison County Railroad Co.*, 49 Ill. 484 ; *Gormley v. Sanford*, 52 Id. 158 ; *Toledo, &c., Railroad Co. v. Morrison*, 71 Id. 616 ; *St. Louis, &c., Railroad Co. v. Capps*, 72 Id. 188 ; *Jacksonville, &c., Railroad Co. v. Cox*, 91 Id. 500 ; *Ogburn v. Connor*, 46 Cal. 346 ; s. c. 13 Amer. Rep. 213 ; *Butler v. Peck*, 16 Ohio. St. 334 ; *Tootle v. Clifton*, 22 Id. 247 ; s. c. 10 Amer. Rep. 732 ; *Miller v. Laubach*, 47 Pa. St. 154 ; *Martin v. Jett*, 12 La. 502 ; *Lattimore v. Davis*, 14 Id. 161 ; *Delahoussaye v. Judice*, 13 La. Ann. 587 ; *Minor v. Wright*, 16 Id. 151 ; *Onerton v. Sawyer*, 1 Jones L. (N. C.) 308 ; *Porter v. Durham*, 74 N. C. 769. See *Raleigh, &c., Railroad Co. v. Wicker*, 74 Id. 220 ; *Livingston v. McDonald*, 21 Iowa 160 (a leading case) ; *Van Orsdel v. Burlington, &c., Railroad Co.*, 56 Id. 470 ; s. c. 5 Amer. & Eng. Railroad Cases 53 ; *Herrington v. Peck*, 11 Bradw. 62 ; *Hicks v. Silliman*, 93 Ill. 255 ; *Ludeling v. Stubbs*, 34 La. Ann. 935 ; *Guesnard v. Bird*, 33 Id. 796 ; *Barrow v. Landry*, 15 Id. 681 ; *Louisville, &c., Railroad Co. v. Hays*, 11 Lea (Tenn.) 382 ; *Executor of Lord v. Carbon Iron Manuf. Co.*, 38 N. J. Eq. 452.

An injunction to enjoin the throwing up of an embankment so as to prevent the natural flow of the surface-water, will be refused ; because the plaintiff has his right of action at law : *Luney v. Jasper*, 39 Ill. 46.

But the plaintiff is not estopped by his deed of grant of way to a railroad company, from bringing a suit for damages in obstructing the surface-water :

Jacksonville, &c., Railroad Co. v. Cox, 91 Ill. 500.

In *Livingston v. McDonald*, 21 Iowa 160, it was held, "that the owner of the higher land had an unqualified right to drain for agricultural purposes the surface-water, or water flowing in no regular or definite channel upon his own lands, and is not liable to an action by the lower proprietor for so draining as to prevent any portion of those waters reaching the land of the lower owner;" but "the owner of the higher land has no right, even in the course of the use and improvement of his farm, to collect the surface-water upon his own lands into a drain or ditch, increased in quantity or in manner different from the natural flow, upon the lower lands of another, to the injury of such lands." The last part of this proposition is the rule of the civil law; and the first part is not in contravention of the common law.

EXAMPLES.—A stream ran through the plaintiff's land. In times of heavy rains large quantities of water escaped over the banks of this stream upon the plaintiff's lands, and with the accumulations of rainwater, had a natural outlet therefrom over the lands of the defendants. To prevent these waters from flowing over and flooding their lands, the defendants erected embankments upon the plaintiff's lands, rendering them less fit for cultivation, and in other respects injuring them. It was held that an injunction to restrain the defendants preventing the water from flowing was rightly granted: *Nininger v. Norwood*, 72 Ala. 277; s. c. 47 Amer. Rep. 412.

The plaintiff and defendant were co-terminous land-holders, each engaged in agriculture, the former owning the inferior, and the latter the superior heritage. Through the plaintiff's lands, and near the dividing line, flowed a natural stream or branch, which was the natural outlet for a part, at least, of the water, which fell on defendant's land. The water

flowed naturally from the defendant's land upon the plaintiff's land, and across a portion of it into the stream. It flowed slowly, not in a collected body, but scattered over the surface. In its natural state, part of the water was absorbed, and part evaporated before it reached the lands of the plaintiff. By means of ditches, the defendant collected all this surface-water into one channel, thereby draining his own lands and causing the water to flow much more rapidly, and in one body, into the branch on the plaintiff's lands. This emptied the water off the defendant's land much sooner, and as a consequence, precipitated it much more rapidly, and in increased volume on the plaintiff's land, thereby flooding a portion of his lands, and rendering them uncultivable. It was ruled that the "defendant had no right, by ditches or otherwise, to cause water to flow on the lands of the plaintiff, which, in the absence of such ditches, would have flowed in a different direction. As to the water theretofore accustomed to flow on the lands of the plaintiff, the defendant was not bound to remain inactive. He was permitted to so ditch his own lands, or to drain them, provided he did so with a prudent regard to the welfare of his neighbor, and provided he did no more than concentrate the water, and cause it to flow more rapidly, and in greater volume on the inferior heritage. This, however, must be weighed and decided with a proper reference to the value and necessity of the improvement to the superior heritage, contrasted with the injury to the inferior; and even the license must be conceded with great caution and prudence. It is a question for the jury to determine, on the facts of each particular case, under proper instructions from the court:" *Hughes v. Anderson*, 68 Ala. 280; s. c. 44 Amer. Rep. 147.

MISSOURI CASES.—The Missouri cases are in much confusion, first following the civil law: *Lumier v. Francis*, 23 Mo.

181; *Shane v. Kansas City, &c., Rd. Co.*, 71 Id. 237; s. c. 36 Am. Rep. 479; 5 Am. & Eng. R. R. Cas. 64.

Other cases seem to follow the common-law rule: *Mumkers v. Kansas City, &c., Rd. Co.*, 72 Mo. 514; s. c. 5 Am. & Eng. R. R. Cas. 79; *McCormick v. Kansas City, &c., Rd. Co.*, 70 Mo. 359; *Jones v. Hannover*, 55 Id. 462; *McCormick v. Kansas City, &c., Rd. Co.*, 57 Id. 433. In the latest case the court swings back to the civil-law rule: *Benson v. Chicago & Alton Rd. Co.*, 78 Mo. 504.

NEW HAMPSHIRE RULE.—The New Hampshire court pursues a middle course, it would seem, between the two accepted rules. In *Bassett v. Salisbury Manf. Co.*, 43 N. H. 569; 28 Id. 438; 3 Am. L. Reg. 223, it was held in respect to water percolating through the soil that the landowner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land. In *Sweet v. Cutts*, 50 N. H. 439; s. c. 11 Am. L. Reg. 11, the same rule was applied to surface-water.

In Vermont a rule not very dissimilar from the New Hampshire rule was followed: *Beard v. Murphy*, 37 Vt. 99; *Chatfield v. Wilson*, 28 Id. 49.

The principal case does not differ greatly from the rule of these last three cases; and, perhaps, on the whole, they

announce the most just and equitable rule.

DOCTRINE APPLICABLE TO RULES.—All the cases agree, however, whatever rule they may pursue, that adjoining landowner cannot gather surface-water into a body and discharge a mass or body upon his neighbor's land. Such is the recent English case of *Wright v. Lancashire, &c., Ry. Co.*, 23 Am. Rep. 633; s. c. 50 L. T. 472; *Wright v. Moulson*, 75 Ind. 241; *Gillison v. Charleston*, 16 W. Va. 282; *Ry. v. Fletcher*, L. R., 3 E. & I. Ap. 330; *Templeton v. Vashoe*, 72 Ind. 330; *Tootle v. Clifton*, 22 Ohio St. 247; 10 Am. Rep. 732; *Ogburn v. Co.*, 46 Cal. 346; s. c. 13 Am. Rep. 21.

Nor can the owner of the upper land lawfully discharge the waters of a natural pond or reservoir of surface-water through an artificial channel directly over the land of another: *Agnew v. Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Livingston v. McAlld*, 21 Iowa 160, (an underground ditch); *Foot v. Brouson*, 4 Lans. nor from springs; *Curtis v. Eastern Co.*, 98 Mass. 428: even though it be naturally that way: *McCormick, Rd. Co.*, 70 Mo. 359; s. c. 35 Am. Rep. 431; *Gillison v. Charleston*, 16 W. Va. 282.

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Supreme Court of California.

HART v. WESTERN UNION TELEGRAPH COMPANY.

A telegraph company is liable for whatever loss naturally and in the usual course of things follows from its failure to transmit a message promptly and correctly, although such message was written in cipher, or was otherwise unintelligible to the company.

A stipulation printed on a blank upon which a telegraph message is sent, purporting to exempt the telegraph company from all liability for mistakes or delays in transmission or delivery, or for non-delivery of any unrepeatable message, when happening by the negligence of its servants or otherwise, beyond the amount receivable for the message, is not binding.

for sending the same, is void for want of consideration. Such company cannot stipulate against or limit its liability for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators, or the use of defective instruments. Such company is exempt only for errors arising from causes beyond its control, and the burden of showing such exemption rests upon it, in an action to recover for an alleged loss.

A telegraph company is not liable for a loss arising from a mistake in the transmission of a message, when such mistake was occasioned by a break in the electric current, produced by atmospheric influences beyond the company's control.

THE opinion of the court was delivered by

Ross, J.—On the 15th day of December 1882, the plaintiff delivered to the defendant, at its Stockton office this message:

"George W. McNear, San Francisco:—Buy bail barley falun; report by mail. GEORGE HART."

The message was promptly transmitted and delivered as written, except that the word "bail" was changed to the word "bain." By the private cipher code of McNear, used by the plaintiff in the message, the word "bail" means "one hundred tons," and the word "bain" means "two hundred and twenty-five tons." As the message was delivered it directed McNear to buy for the account of the plaintiff two hundred and twenty-five tons of barley, whereas as it was written by the plaintiff, McNear was directed to buy on plaintiff's account one hundred tons only. Acting on the message received, McNear bought for plaintiff two hundred tons of barley. When the plaintiff discovered that fact he notified the defendant that one hundred tons had been bought in excess of that directed to be bought by the original message, and asked the defendant what he should do with the surplus so purchased. Defendant refused to give any instruction in regard to it. Plaintiff thereupon sold the barley at the highest market rate, his loss on the extra one hundred tons being \$129.82. It is for the loss thus sustained by him that the action is brought.

At the trial the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form. It was also admitted that the message was written by the plaintiff, upon a printed form prepared by the defendant, underneath the words "send the following message, subject to the above terms, which are hereby agreed to," and that among the "above terms" referred to are the following: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating
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office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any un-repeated message, whether happening by neglect of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

That the message in question was not "repeated" is contended by the plaintiff. It further appears in the case that no explanation of the meaning of the dispatch was made by the plaintiff at the time he delivered it to the defendant, for which reason, and because it is claimed, the message under consideration was in cipher, and the plaintiff contends that the measure of damages is the price paid for the transmission of the telegram—in this case, thirty cents. In support of this point it is said by counsel that "the decisions of all the courts uniformly declare that unless the importance of the message is shown either by its own terms or by explanation made to the person receiving it in behalf of the telegraph company, no damages are recoverable for failure or delay in transmission beyond the price paid for that purpose."

In this appellant's counsel is mistaken. The cases cited by the defendant undoubtedly sustain the point he makes, and there are other cases to the same effect. Some of those decisions were based on messages which were in cipher, and others, messages which, though not in cipher, did not themselves disclose the extent or importance of any transaction had in contemplation by the parties. In those cases substantial damages were refused because neither the messages nor other information given made known to the operator what was contemplated. Hence, it was ruled that plaintiff could not recover of the telegraph company what, not understanding the message, he could not have contemplated as the effect of a miscarriage or failure.

While not doubting the general rule that damages must be measured as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; that is, such as in

be naturally expected to follow its violation, we do question and think not sound the *application* of that rule as made in the class of cases to which allusion is above made.

Telegraph companies have conferred upon them by law certain privileges, among them the right of eminent domain, and they are charged with certain duties, among them the obligation to send promptly and correctly such messages as are intrusted to them. Of course, if illegibly written, the operator may reject a message; but if plainly written, his duty is to send it as written. Why has he the right to know what the message refers to? In what way would such knowledge aid him in the discharge of his duty to send it correctly? "One of the great attractions," say Scott and Jarnagin, in their treatise on the law of telegraphs, § 404, "which this mode of communication presents, is the brevity of the dispatch; such abbreviations being used in many cases as will enable the person for whom it is intended alone to understand it; and, hence, the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery of messages. So that an explanation of the meaning, importance and bearing of each message would be an insufferable annoyance, and, in the multiplicity of messages delivered for transmission, could not be remembered, even if the time could be spared to listen to it; and it would rarely afford any benefit or advantage to the company after the information was communicated." Proceeding, these writers say, and say correctly, that though the company, through its agents, may not know the meaning of the particular message, they do know that messages of great value and importance, involving heavy losses in each case of failure, or delay, or mistake in their transmission, are constantly sent over their wires; and they do know that they hold themselves out to the public as prepared at all times and for all persons, to transmit messages of this description. And the rule of damages, as applied to telegraph companies, is there deduced, which we think the true rule, namely, that, although the message be unintelligible to the company, yet as its undertaking was to transmit the message promptly and correctly, both parties contemplated that, whatever loss should naturally, and in the usual course of things, follow a violation of that obligation, the company should be responsible for. The same conclusion was reached by the Supreme Court of Alabama in the case entitled *Doughtry v. The American Union Telegraph Company*, decided in December 1883,

a note of which will be found at page 731, 46 American Reports, and by the Court of Appeals of Virginia in the case of the *Western Union Telegraph Company v. Reynolds*, 77 Va. 173. See, also, *Rittenhouse v. The Independent Line of Telegraph*, 1 Daly 47.

It is also contended on behalf of the defendant corporation that as the message in question was not "repeated," defendant is not responsible under any circumstances beyond the amount received for its transmission; and this because it is so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. There are numerous cases that hold that such a rule on the part of the company is reasonable, valid and binding on the sender of the message. The cases that so hold are too numerous to be here referred to in detail. They will be found collated in a note to the case of *Western Union Telegraph Company v. Blanchard*, reported in 46 American Reports, page 486. But there are many cases to the contrary, and the latter class we think based on the better reason. In the first place we agree with the Supreme Court of Illinois in the case of *Tyler v. Western Union Telegraph Company*, 111 Ill. 421, and s. c. 74 Ill. 170, where it is held that the regulation requiring messages to be repeated is not a contract binding in law for the reason that the law imposed upon the company duties to be performed, for the performance of which it was entitled to a compensation fixed by itself, and which the sender had no choice but to pay; that among those duties was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost of fifty per cent. of the original charge. To the same effect is *Bartlett v. Western Union Telegraph Company*, 62 Me. 218, and *Candee* against the same company, 34 Wis. 477, where the court say: "Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him

and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself had fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, whether it can at the same time, and as a part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create an obligation or duty, at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed, and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rate of transmitting day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise or to destroy the obligation thus created. Regarding the regulations

in this light, therefore, as well as in that of correct public policy, it is seen that effect cannot be given to them as a means of release or escape on the part of the company from all liability for performance of its contract. The regulations cannot serve to protect the company from the consequences resulting from the negligence or fraud of its officers or agents, or from the entire failure to perform the service, no good excuse for such failure being shown."

We therefore hold that the stipulation purporting to exonerate the corporation defendant from all liability for mistakes or delay in the transmission or delivery, or for non-delivery of any undelivered message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is without want of a consideration to support it. And further, that it is not competent for telegraph companies to stipulate against or limit their liability for mistakes happening in consequence of their own negligence, such as want of proper skill or ordinary care on the part of their operators or the use of defective instruments. See authorities above cited and *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa 100; *Wolf v. Western Union*, 62 Penn. St. 83; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *U. S. Tel. Co. v. Gildersleeve*, 29 Mo. 240; *Western Union v. Buchanan*, 35 Ind. 429; *Hibbard v. Western Union*, 33 Wis. 553; *Tel. Co. v. Griswold*, 47 Ohio St. 30.

We think the true rule is, that such companies are exempted from liability for errors arising from causes beyond their own control. As would seem to be the rule adopted by statute in this state; § 2, 162, of the civil code, it is declared: "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein."

We are further of opinion that the plaintiff having proved a mistake in the message as delivered, the onus was upon the defendant to show how it occurred: *Tyler v. Western Union Tel. Co.*, *supra*.

If the error was caused by atmospheric disturbances, or a material displacement of the wires, the defendant knew it and ought to show it. This defendant undertook to do on the trial in the case below. There was testimony given tending to show that before the time the message in question was sent trouble was experienced in the transmission of dispatches, owing to the condition

the weather; that it was foggy and stormy. It was further made to appear that in the telegraphic code the following lines and dots, when transmitted along the wire, made the word "bail:"

And that the word "bain" is expressed by the following:

There was also testimony tending to show that the operators at Stockton and San Francisco were competent, and that the one at San Francisco was especially careful in the matter of this dispatch. The latter testified that she took particular pains with the message in question, "as is shown by the mark under one of the cipher words—the last word, because it was an unusual word—'falun.' I asked Mr. Dixon to repeat it, and I put a little mark, 'x,' under it, to show that it was repeated. The other words being ordinary words, I paid no attention to, because it is something very likely to be received in any message."

There was also given on behalf of the defendant further testimony tending to show that the error resulting in the change of the word "bail" to "bain," was caused by a break in the electric current, and that this, in turn, was caused by atmospheric influences prevailing at the time, and, of course, beyond the control of defendant. If such was the fact, the verdict should have been for the defendant. But it was a question of fact for the jury, under appropriate instructions from the court. The court should have told the jury that the mistake in the message, as delivered, being admitted, the presumption was that it occurred through the negligence of defendant, but that if they believed from the evidence that the mistake occurred through a cause or causes beyond defendant's control, such as a break in the electric current, produced by atmospheric influences, their verdict should be for the defendant. We think this question, which was the turning one in the case, was not fairly submitted to the jury in the court below, and we must, therefore, remand the case for a new trial.

Judgment and order reversed and cause remanded for a new trial.

McKINSTRY J., and McKEE, J., concurred.

Supreme Judicial Court of Massachusetts.

CHARLES H. CLEMENT v. WESTERN UNION TELEGRAPH

A stipulation in a telegraph blank that the company shall not be liable for takes or delays in the transmission or delivery of any unrepeatable message, happening by negligence or otherwise, beyond the amount received for sending the same, is valid and binding, and the sender of such a message cannot recover the amount paid, even though the delay was caused by the negligence of the company's servant in delivering the message.

Although the telegraph blank with the printed conditions is not used, if the sender is aware of the conditions under which the company by its rules accepts and transmits messages, he is bound by such conditions.

TORT for injuries sustained by the plaintiff in consequence of the neglect of the defendant seasonably to deliver a message by telegraph. In the Superior Court, the case was sent to a referee, who found the following facts:

On April 27th 1880, the plaintiff, who lived in Haverhill, had a libel of divorce pending in the Supreme Judicial Court, the case being pending in Salem, and had arranged with H. P. Moulton, his attorney, to give him notice when the case was to come on. The case came on in order for the next day, Moulton, on the 27th, left at the office of the American Union Telegraph Company in Salem the following message: "Salem, April 27th 1880. To Charles H. Clement, 2 Benjamin Street, Haverhill, Mass. Come to-morrow with your witnesses. H. P. Moulton."

The office at the time was in charge of the office boy only, and nothing was said as to whether the American Union Telegraph Company had a line to Haverhill or not. That company had no line to Haverhill, and the operator, upon her return to the office, finding this message, endeavored ineffectually to communicate with Moulton, but not finding him at his office, she left a note for him stating the fact, and that the message had been, or would be, sent by the Western Union Telegraph Company. Not being able to inform Moulton that her company had no line to Haverhill, she tore off the heading printed upon the blank above the message, rewrote it, and sent the message to the office of the Western Union Telegraph Company, also in Salem, for transmission to Haverhill, and it was there received by the defendant's agent and duly delivered to their office in Haverhill. The message did not appear to have been rewritten upon a blank of the defendant company, and the terms and conditions upon which the defendant by its

provided that messages should be sent over its line, as set forth in the form or blank in use by it, were in fact known to Moulton, and this form of blank had been in use by him in sending messages by the defendant's line. Subsequently to the sending of the message, and after April 27th, the operator of the American Union Telegraph Company explained to Moulton how it was sent by that line, and Moulton said to her that it was all right.

The form in use by the defendant corporation contained, among other stipulations the following: "All messages taken by this company subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

The message was received at the office of the defendant in Haverhill about fifteen minutes before eight o'clock in the evening of April 27th 1880. It was held at the office until the hour of closing, at eight o'clock, when it was given with others to the messenger boy for delivery. The plaintiff lived at No. 2 Benjamin Street, in Haverhill, distant from the defendant's office something more than half a mile. There was no evidence whether any effort was made by the messenger to deliver the message, except the fact that the message was returned to the office the next morning with the report that he could not find the plaintiff. The message was not in fact received by the plaintiff until May 2d.

On April 28th the case was reached in its order, and the court ordered the libel dismissed because the libellant and his witnesses were not present. The failure of the plaintiff to attend court was by reason of the non-delivery of Moulton's message aforesaid in season for the plaintiff or his witnesses to be in attendance when the case was reached.

The plaintiff had incurred expense for counsel fees in the libel suit, and for the attendance of himself and witnesses at prior terms of the court, and for the libellee's costs.

Upon these facts, the auditor found that the message in question was sent upon and subject to, the condition and agreement, that,

unless it was repeated or insured, no damages beyond the cost of the message could be recovered for any failure or delay in the delivery of it, that the defendant, by its agents, was guilty of negligence in not delivering said message to the plaintiff, or to the place of abode, to which it was directed; that the message was sent by Moulton under an arrangement and agreement that the plaintiff should so receive notice when his case was to be reached in court for trial, but that the defendant and its agents receiving and transmitting said message were not informed of the circumstances under which it was sent, nor as to its importance, or of any especial peculiar injury or damage that might result from neglect or failure to transmit or deliver the same; and that the defendant was liable for the items of damage claimed, except for the sum of twenty-five cents paid for the cost of the message, with interest thereon from the date of the writ.

In the Superior Court, the case was tried before ROCKWELL, without a jury, on the auditor's report. The judge ruled that the plaintiff was only entitled to recover the amount paid for sending the message, and found for him accordingly. The plaintiff asked for exceptions.

H. N. Merrill and J. O. Wardwell, for the plaintiff.

G. S. Hale and C. F. Walcott, for the defendant.

The opinion of the court was delivered by

MORTON, C. J.—The evidence was sufficient to justify the auditor and the presiding justice of the Superior Court in finding that the contract with the defendant, made by the plaintiff through agent Moulton was subject to the conditions and stipulations contained in the form issued by the defendant. One of these stipulations is as follows: "It is agreed between the sender of the message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same."

It has been held in this commonwealth, that a regulation or stipulation of this character is reasonable and binding upon the parties to it: *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299, and cases cited. In the case at bar, the plaintiff dis-

repeat his message, and it follows that, under the contract which he made, he can recover only twenty-five cents, the cost of the message.

The plaintiff contends that, as the auditor has found that the defendant by its agents was guilty of gross negligence in not delivering the message seasonably, this stipulation does not exempt the defendant from liability for the damages actually sustained.

The only negligence shown in this case was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt, entrusted for delivery. It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or delivering a message, so that it would not be protected by its regulation from liability for the actual damages, though in excess of the sum stipulated. But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation; and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility.

Without discussing the question as to what is the difference, if any, between ordinary and gross negligence, we are of opinion that the only negligence proved in this case was such negligence as the parties intended to include in their stipulation; and that such stipulation, as applied to such negligence, is reasonable and valid. It follows that the Superior Court rightly ruled and found that the plaintiff was entitled to recover only twenty-five cents.

Exceptions overruled.

DUTY OF TELEGRAPH COMPANIES AS TO MESSAGES.—Although there are some cases to the contrary: *Parks v. A. C. Tel. Co.*, 13 Cal. 422; *Baldwin v. U. S. Tel. Co.*, 1 Laus. 125, the weight of authority clearly is that telegraph companies are not common carriers: *Birney v. N. Y. & W. T. Co.*, 18 Md. 341; *W. U. T. Co., v. Carew*, 15 Mich. 525; *Breese v. U. S. Tel. Co.*, 45 Barb. 274.

They, however, exercise a public employment, with duties and obligations analogous to those of common carriers

and other public servants: *Graham v. Davis*, 4 Ohio St. 377; *Telegraph Co. v. Griswold*, 37 Id. 311; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Passmore v. W. U. Tel. Co.*, 78 Penn. St. 238; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421.

They must transmit all prepaid messages presented for transmission (*Breese v. U. S. Tel. Co.*, 48 N. Y. 132), excepting such as are indecent or contrary to law (*W. U. Tel. Co. v. Ferguson*, 57 Ind. 495), with a care and diligence adequate to the business: *Breese v. U. S. Tel. Co.*, 48 N. Y. 132.

ordinary care and diligence must be used by the company: *Pipe v. W. U. Tel. Co.*, 9 Ill. App. 284. This seems more than that the company need deliver a message only at the office of the receiver. If he is not there it must be ordinary diligence to find him: *Pipe v. W. U. Tel. Co.*, 9 Ill. App. 284. It must send the message not merely to the telegraph station, but to the person addressed: *W. U. Tel. Co. v. Lindsey*, 62 Ind. 271. Messages must be sent with reasonable promptitude, though what is reasonable depends upon the circumstances of each case, and is to be determined by a jury: *Bolan v. W. U. Tel. Co.*, 8 Biss. 131. It is not the duty of the company to keep more than one operator at a small station, and delay while he is at dinner is not negligence: *Bolan v. W. U. Tel. Co.*, 8 Biss. 131. Nor is delay at a repeating office unreasonable: *Bolan v. W. U. Tel. Co.*, 8 Biss. 131. All messages must be transmitted in the order of time in which they are received; unreasonable discrimination is prohibited by law: *Davis v. W. U. Tel. Co.*, 1 Cin. 100; *W. U. Tel. Co. v. Ward*, 23 Ind. 377; and punitive damages have been held allowable for wilful and unjust discrimination: *Davis v. W. U. Tel. Co.*, 1 Cin. 100. But private dispatches must yield to those given precedence by nature—e. g., press dispatches—or to dispatches of a public nature: *W. U. Tel. Co. v. Ward*, 23 Ind. 377.

LIABILITY.—The method of enforcing the faithful performance of its duties by a telegraph company is found in the pecuniary responsibility which they incur for failure: *Telegraph Co. v. Grinsold*, 27 Ohio St. 311. Generally a telegraph company is liable for any loss or damage caused by its negligence in transmitting and delivering messages: *N. Y. & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298; *U. S. Tel. Co. v. Gilderleve*, 29 Md. 283; *W. U. Tel. Co. v. Fontaine*, 58 Ga. 433, and cases *infra*. Instances wherein it has been held liable, are, amongst

others, the following: For unnecessarily delaying a message announcing the death of the receiver's mother: *So Ho v. U. Tel. Co.*, 55 Tex. 308; for negligently permitting a dispatch saying a draft was given to be substituted for one saying the bank had drawn no such draft, and this notwithstanding the draft was paid: *Strauss v. Tel. Co.*, 8 Biss. 104. For the negligence of an operator in not keeping a country seat on the line: *W. U. Tel. Co. v. Dickman*, 35 Ind. 430. For causing by failure to deliver correct reports: *Turner v. Tel. Co.*, 458. And such reports are presumed to have been correctly given to the company contracting to furnish them. For delay in delivering a message touching certain property: *Bryant v. Tel. Co.*, 1 Daly 576, and the plaintiff may not exhaust his remedies against the debtor before suing the company. For changing an order to buy 500 to one to buy 2500: *W. & N. O. Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122. For failure to forward beyond an intermediate office: *U. S. Tel. Co. v. West*, 262 Penn. St. 262. For sending a message authorizing a bank to give credit, when the operator knew the sender intended the cashier by whom the message was reported to have been signed, and that the sender had no authority for such cashier: *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549. For delaying a message by an attorney's negligence that a case "on call" be held until adjournment until he could appear: *Sprague v. W. U. Tel. Co.*, 6 D.

But a telegraph company is not liable for errors or imperfections in transmitting messages which arise from causes not within its control; that is, from the irregularity of the electrical current, irregularity of its power or efficiency, and interference or confusions arising from storm

heat or cold; nor from imperfections in the working of the wires arising from necessary imperfections or inherent characteristics in the metals, or from things necessarily pertaining to the business of communicating by telegraph, or the machinery and implements invented for that purpose: *White v. W. U. Tel. Co.*, 14 Fed. R. 710; *Sweatland v. I. & M. Tel. Co.*, 27 Ia. 433.

SAME—CONNECTING LINES.—Connecting telegraph companies are bound to transmit messages at the request of other companies, and are liable for negligence in not doing so: *Baldwin v. U. S. Tel. Co.*, 54 Barb. 505. The agency of one company to take messages for another has been presumed: *Baldwin v. U. S. Tel. Co.*, 54 Barb. 505; 1 Lans. 125. But see s. c. 45 N. Y. 744. A limitation of liability applies only to the first company, and not to succeeding connecting lines: *Squire v. W. U. Tel. Co.*, 98 Mass. 232. A statute requiring telegraph companies under penalty to take messages from connecting lines is beneficial to the public, and should be liberally construed: *U. S. Tel. Co. v. W. U. Tel. Co.*, 56 Barb. 46. But see *Thurn v. Alta Tel. Co.*, 15 Cal. 472. If the negligence be by a connecting company, either the first telegraph company or the sender may sue for the penalty: *U. S. Tel. Co. v. W. U. Tel. Co.*, 54 Barb. 46; *W. U. Tel. Co. v. Ward*, 23 Ind. 377.

CONSIDERATION.—The mutual obligations of the sender and the company are sufficient consideration to maintain the action, although no money was paid for transmission: *W. U. Tel. Co. v. Meek*, 49 Ind. 53.

NATURE OF ACTION.—The action for damages for a failure to deliver a message may be at common law or by statute. Although an action *ex delicto* it is founded upon a contract; and that contract is the contract to transmit, not the contract the benefit of which was lost

by the telegraph company's negligence: *W. U. Tel. Co. v. Hopkins*, 49 Ind. 224.

PARTIES.—Either the receiver or the sender of a message may sue the telegraph company for negligence in transmitting or delivering it: *Aiken v. Tel. Co.*, 5 S. C. 358; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Rose v. U. S. Tel. Co.*, 3 Abb. Pr. N. S. 409; 34 How. Pr. 308; but it has been decided that the sender cannot sue a connecting telegraph company for its negligence. He must sue the company with whom he made his contract: *Thurn v. Alta Tel. Co.*, 15 Cal. 473. In Maryland it is decided that a broker telegraphing an order may sue in his own name, but as trustee for his principal, for damages in delaying it: *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232. In New York it is decided that the broker cannot sue, but the principal must: *Rose v. U. S. Tel. Co.*, 6 Rob. 305; 3 Abb. Pr. (N. S.) 409; 34 How. Pr. 308. In California it is held that in order to give a right of action to the principal the fact of the agency must have been disclosed: *Thurn v. Alta Tel. Co.*, 15 Cal. 472.

DEFENCES.—There are, however, many exceptions and limitations to the doctrine that a telegraph company is liable for damages caused by its delays and errors in sending messages. Such a company may make reasonable rules and regulations for the transaction of its business, non-observance of which may form a good defence to an action for damages against it: *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; *Sweatland v. I. & M. Tel. Co.*, 27 Ia. 433; *Pasmore v. W. U. Tel. Co.*, 78 Penn. St. 238; *W. U. Tel. Co. v. Graham*, 1 Col. T. 230; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 430; *Breeze v. U. S. Tel. Co.*, 48 N. Y. 132.

Thus, a rule that the company will not be liable for the correct transmission of the message beyond the amount received therefor, unless repeated at an additional expense, is a reasonable regu-

a note of which will be found at page 731, 46 American Reports, and by the Court of Appeals of Virginia in the case of the *Western Union Telegraph Company v. Reynolds*, 77 Va. 173. See, also, *Rittenhouse v. The Independent Line of Telegraph*, 1 Daly 474.

It is also contended on behalf of the defendant corporation that as the message in question was not "repeated," defendant is not responsible under any circumstances beyond the amount received for its transmission; and this because it is so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. There are numerous cases that hold that such a rule on the part of the company is reasonable, valid and binding on the sender of the message. The cases that so hold are too numerous to be here referred to in detail. They will be found collated in a note to the case of the *Western Union Telegraph Company v. Blanchard*, reported in 45 American Reports, page 486. But there are many cases to the contrary, and the latter class we think based on the better reason. In the first place we agree with the Supreme Court of Illinois in the case of *Tyler v. Western Union Telegraph Company*, 68 Ill. 421, and s. c. 74 Ill. 170, where it is held that the regulation requiring messages to be repeated is not a contract binding in law, for the reason that the law imposed upon the company duties to be performed, for the performance of which it was entitled to a compensation fixed by itself, and which the sender had no choice but to pay; that among those duties was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost of fifty per cent. of the original charge. To the same effect is *Bartlett v. Western Union Telegraph Company*, 62 Me. 218, and *Candee* against the same company, 34 Wis. 477, where the court say: "Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him,

and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason and what all must assume to be the intention of the parties, to say that no contract whatever is made between them, and nobody, not even the officers or representatives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself had fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, whether it can at the same time, and as a part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him. Is it possible for the company, or for any other party entering into a contract for a valuable consideration received, to promise and not to promise, or to create and not to create an obligation or duty, at one and the same moment and by one and the same act? The inconsistency and impossibility of such things are obvious. But if there were no such difficulties, or if the occasion or circumstances were such that a valid release might be executed, and it be regarded in that light, still the objection exists that there is no consideration whatever to support it, and it must be held void on that ground. If it be urged that the sender receives his consideration in the reduced price of transmission, or because the company undertakes to send the message at one-half the usual rate of transmitting day messages, that argument ends in proving that the company does not undertake to send the message at all, and that no contract or agreement on its part is made or entered into for that purpose. If the company promises or binds itself at all for the rate or consideration named, and which it is willing to and does accept, then the smallness of such consideration cannot operate to relieve from the promise or to destroy the obligation thus created. Regarding the regulations

W. U. Tel. Co., 11 Neb. 87. Evidence of a local usage in the telegraph office is inadmissible to vary the terms of the contract by which the message was sent: *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299. Nor is evidence admissible that the company made a deduction from the pay of the operator on account of the negligence: *Grinnell v. W. U. T. Co.*, 113 Mass. 299.

Telegrams are often used as evidence of contracts between the sender and the receiver. The party who sends an order by telegraph makes the telegraph company his agent to transmit and deliver it. He is bound by the message as delivered: *Dunning v. Roberts*, 35 Barb. 463; and where the legal rights of the receiver founded upon such order are in question, he is entitled to put in evidence the message actually received, as the original: *Saveland v. Green*, 40 Wis. 431. See, also, *Taylor v. Steamboat R. Co.*, 20 Mo. 254; *Commonwealth v. Jeffries*, 7 Allen 548. But a dispatch offered in evidence must be proved to be authentic (*Richie v. Bass*, 15 La. Ann. 668) either by proof of the operator's handwriting or otherwise. But a wife's telegrams cannot be used against her husband: *Benford v. Sanner*, 40 Penn. St. 9.

A telegraph company may be required to produce telegrams for use as evidence upon *subpoena duces tecum*, and this notwithstanding a statute making it a misdemeanor for any person employed in transmitting messages by telegraph to make known the contents of any message to any person except to him to whom it is addressed, or to his agent or attorney: *Woods v. Miller*, 55 Ia. 168. And see *Ex parte Brown*, 7 Mo. App. 484. Nor can the manager of a telegraph company refuse to produce a telegram, upon order so to do by a court, on the ground that, by so doing, he would violate his duty to the company, and he is punishable for contempt if he refuse: *Ex parte Brown*, 7 Mo. App. 484. But while an agent of a

company is punishable for contempt in refusing to produce messages in possession of the company before a grand jury, on proper process, a *subpoena duces tecum* merely describing such messages by the names of the senders and the persons addressed and as sent "within fifteen months last past," is not such process: *Ex parte Brown*, 72 Mo. 83; 37 Am. Rep. 426. See, also, *Ex parte Brown*, 7 Mo. App. 484.

DAMAGES.—The general rule is that a party injured by error, delay, or failure, by negligence, in transmitting and delivering a telegram, is entitled to recover all his damages, including gains prevented as well as losses sustained. This rule is subject to two qualifications: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, such as might naturally be expected to follow its violation, and they must be certain: *Landsbeger v. Am. Tel. Co.*, 32 Barb. 533; *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. U. S. Tel. Co.*, 1 Lans. 125.

Instances of the application of the rule that a telegraph company is not liable for all damages which may arise from its negligence in sending and delivering a message, the importance of which it is not informed and cannot estimate from reading the dispatch, are these: Where the dispatch is in cipher, or obscurely worded, nominal damages only are recoverable, unless the company has been informed of its nature: *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Bekam v. W. U. Tel. Co.*, 8 Biss. 131; *W. U. Tel. Co. v. Martin*, 9 Bradw. 596; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *White v. W. U. Tel. Co.*, 14 Fed. R. 710; *Mackay v. W. U. Tel. Co.*, 16 Nev. 222. Thus, the company was held not liable where the message was "Sell fifty (50) gold," not having been told that this meant "Sell \$50,000 of gold:" *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 233. The fact that the employees to

whom the message was delivered knew the sender was a stock operator, and that he informed the boy in the office that the dispatch required promptness, is not sufficient information of its nature: *Candee v. W. U. Tel. Co.*, 34 Wis. 471. So, where A. wrote B.: "Have you any more northwestern mess pork, or prime mess? Also extra mess? Telegraph price on receipt of this." B. replied by wire thus: "Letter received. No light mess here. Extra mess twenty-eight seventy-five (\$28.75)." And A. rejoined by telegraph: "Dispatch received. Will take two hundred extra mess, price named," which dispatch was delayed. *Held*, that A. could not recover damages occasioned by an advance in the meat during the delay: *Beaupre v. P. & A. Tel. Co.*, 21 Minn. 155. Nor will a telegraph company be liable for delaying a cipher dispatch, although the telegraph manager knew such dispatches ordinarily related to mining and stock speculations, there being no explanation of the importance of the particular dispatch in question: *Mackay v. W. U. Tel. Co.*, 16 Nev. 222. But a message, "Will you give one fifty for twenty-five hundred at London? Answer at once, as I have only till night," is not obscure or in cipher so as to fall within the meaning of a stipulation that the company "assumed no liability for errors in cipher or obscure messages:" *Telegraph Co. v. Griswold*, 37 Ohio St. 301.

The measure of damages has also been passed upon in the following cases:

Dispatch: "Can close Valkyria and Othere, 22, 20, net Montreal. Ans. immediately." *Held*, that the commissions which the sender could have earned as a broker in effecting a charter for the two vessels named Valkyria and Othere, if the message had been duly transmitted, were not damages either actually contemplated or fairly supposed to have been contemplated by defendant, and, therefore, not recoverable: *McCall v.*

W. U. Tel. Co., 44 N. Y. Superior Ct. 487; 7 Abb. N. Cas. 151.

A telegraphic order for sacks of salt was transmitted *casks*. The casks were shipped and had to be sold at below the market price at the place of shipment. *Held*, that the difference between such market price and the selling price, together with the expense of transportation, was not an improper measure of damages: *Burton v. Tel. Co.*, 41 N. Y. 545.

For delaying a dispatch ordering an attachment until other creditors obtained attachments exhausting the assets of the debtor, the amount of the sender's claim has been held recoverable (*Parks v. Alta Tel. Co.*, 13 Cal. 422), less any sum which the sender may have received on account of his debt: *Bryant v. Am. Tel. Co.*, 1 Daly 576.

Where an incorrect telegraphic market report induced A. to buy, he was held entitled to the difference between the actual purchase price and that stated in the report: *Turner v. Hawkeye Tel. Co.*, 41 Ia. 458. An advance in the price of stock ordered has been held to be the measure of damages: *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262.

On failure to deliver promptly a message to "ship oil soon possible," the profits which might have been made on the oil if the message had been delivered and the oil sent in due time, are not the measure of damages, but plaintiff may recover the money paid by him for transmitting the message, the advance in freight, and his expenses incurred by failure of defendant to fulfil the contract: *W. U. Tel. Co. v. Graham*, 1 Col. T. 230.

Where a message to "buy five Hudson" was delivered as "buy five hundred," and before it could be corrected an advance occurred by which sender lost \$1375, this sum was held to be the measure of damages: *Rittenhouse v. I. L. Tel. Co.*, 44 N. Y. 263.

If a telegraph company contract to

transmit without any special restriction of their liability a message accepting an offer to sell certain goods at a certain place for a certain price, and by their negligence in delivering it the sender fails to complete the purchase, he may recover from them, in damages, the difference between the price which, by the message, he agreed to pay, and the price he would have been compelled to pay at the same place in order, with use of due diligence, to have purchased goods there of the same kind, quality and quantity: *Squires et al. v. W. U. Tel. Co.*, 98 Mass. 232. See, also, *True v. I. Tel. Co.*, 60 Me. 9.

Damages for failure to obtain employment as a pilot have been held not remote or speculative: *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; and in any case of telegraphic negligence nominal damages are recoverable, although actual damages be not proved: *First Nat. Bk. v. Tel. Co.*, 30 Ohio St. 555; and, indeed, damages need not be proved; where a case of negligence is made out, they will be presumed: *Western Union Telegraph Co. v. Buchanan*, 35 Ind. 430.

The California and Massachusetts cases placed at the head of this note are opposed to each other in their rulings as to the right of a telegraph company to release itself by contract from liability for negligence. Without attempting to reconcile this conflict of authority, which, perhaps, is impossible, it may be well to call attention to the decisions sustaining the views expressed in each of the cases.

The general rule is undoubtedly the same in the case of telegraph companies as with carriers. They cannot, by contract, relieve themselves from liability for negligence. In affirming this rule the California cases are sustained by the following decisions: *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; *Sweatland v. S. & M. Tel. Co.*, 27 Ia. 432; *Manville v. W. U. Tel. Co.*, 37 Id. 214;

True v. Int. S. Co., 60 Me. 9; *Bartlett v. W. U. Tel. Co.*, 62 Id. 209; *W. U. Tel. Co. v. Graham*, 1 Cal. 230; *Tel. Co. v. Grinnold*, 37 Ohio St. 301; *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558; *Candee v. W. U. Tel. Co.*, 34 Id. 471; *W. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *W. U. Tel. Co. v. Blanchard*, 68 Id. 299; *W. U. Tel. Co. v. Skotter*, 18 Cent. Law Jour. 230 (Georgia 1884); *Dorgan v. Tel. Co.*, 1 Am. L. T. Rep. (N. S.) 406 (C. C., S. D. Ala. 1884); *W. U. Tel. Co. v. Neill*, 57 Tex. 283; *W. U. Tel. Co. v. Brown*, 58 Id. 170; *Womack v. W. U. Tel. Co.*, Id. 176; *W. U. Tel. Co. v. Catchpole*, Tex. Ct. App., Civ. Cas.; *White & Wilson*, sect. 268; *Camp v. W. U. Tel. Co.*, 1 Metc. (Ky.) 164; *Passmore v. W. U. Tel. Co.*, 78 Penn. 238; *W. U. Tel. Co. v. Reynolds*, 77 Va. 173; *Hord v. W. U. Tel. Co.*, (Super. Ct. Cin., G. T. 1878), 6 Am. L. Rec. 529; *Bell v. Dom. L. Co.* (Super. Ct. Montreal 1880), 25 L. C. Jur. 248; *W. U. Tel. Co. v. Fenton*, 52 Ind. 1; *Aiken v. W. U. Tel. Co.*, 5 S. C. 358, 372; *Express Co. v. Caldwell*, 21 Wall. 264, 269; *Pinckney v. W. U. Tel. Co.*, 19 S. C. 71, 73.

But see, *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299; *Redpath v. W. U. Tel. Co.*, 112 Id. 71; *Ellis v. Am. Tel. Co.*, 13 Allen 226; *Clement v. W. U. Tel. Co.*, 137 Mass.; *Becker v. W. U. Tel. Co.*, 11 Neb. 87; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132, per EARL, Com.; *Schwartz v. A. & P. Tel. Co.*, 18 Hun 157; *White v. W. U. Tel. Co.*, 5 McCrary 103; *Jones v. W. U. Tel. Co.*, 18 Fed. Rep. 717; *Macandrew v. El. Tel. Co.*, 17 C. B. 3; *Potts v. El. S. Co.*, 18 Law Rep. 477; *Wann v. W. U. Tel. Co.*, 37 Mo. 472; *Lassiter v. W. U. Tel. Co.*, 18 Fed. Rep. 90.

But it appears that in Massachusetts, Nebraska and Missouri, telegraph companies may contract against liability for negligence, although a railroad company

may not do so. Compare *Schall District in Medfield v. B. H. & E. Rd. Co.*, 102 Mass. 552, with *Grinnell v. W. U. Tel. Co.*, 113 Id. 299, 306; *Redpath v. W. U. Tel. Co.*, 112 Id. 71; *Ellis v. Am. Tel. Co.*, 13 Allen 226. Compare also, *Kirby v. Adams Ex. Co.*, 2 Mo. App. 369; and *Drew v. Red Line Transit Co.*, 3 Mo. App. 495, with *Wann v. W. U. Tel. Co.*, 37 Mo. 472. Compare, also, *A. & N. R. Co. v. Washburn*, 5 Neb. 117, with *Becker v. W. U. Tel. Co.*, 11 Id. 87.

The weight of authority is therefore in favor of denying the validity of contracts against liability for the telegraph company's negligence.

The decision of the California case is, however, opposed to the weight of authority in ruling upon the liability of the telegraph company for damages resulting from errors in transmitting cipher dispatches. "It is true, that in two or three early cases, the doctrine has been advanced that a telegraph company is liable to its employer for the actual and proximate loss that he sustained through the breach of a contract to communicate a message intelligible to the person addressed, although the com-

pany was entirely ignorant when it made the contract of the meaning of the message:" Gray on Tel. Communication, sect. 87, citing *Strasburger v. W. U. Tel. Co.* (Super. Ct. N. Y. 1867), *Allen's Tel. Cas.* 661; *Rittenhouse v. Ind. Line of Tel.*, 1 Daly 474; s. c. 44 N. Y. 263; *Bowen v. L. E. Tel. Co.* (Com. Pl. Ohio), 1 Am. Law Reg. 685. See, also, *Dougherty v. Am. Tel. Co.* (S. C. Ala. 1884), 18 Cent. L. J. 428. But the general rule is that the damages recoverable for the breach of a contract to communicate a message of this description are simply nominal: *Idem.* Citing *Candes v. W. U. Tel. Co.*, 34 Wis. 471; *Mackey v. W. U. Tel. Co.*, 16 Nev. 222; *Dorgan v. Tel. Co.* (C. C., S. D. Ala. 1874), 1 Am. L. T. Rep. (N. S.) 406; *Daniel v. W. U. Tel. Co.*, 61 Tex. 452; *Sandurs v. Stuart*, 1 C. P. Div. 326; 15 Chi. Leg. News 220; *W. U. Tel. Co. v. Reynolds*, 77 Va. 173; *Dougherty v. Am. Tel. Co.*, 18 Cent. L. J. 428; *Pinckney v. W. U. Tel. Co.*, 19 S. C. 71, 74. See *supra*, Damages. Also, 23 Am. L. Reg. (N.S.) 281.

ADELBERT HAMILTON.

Chicago.

United States Circuit Court, District of Rhode Island.

MEALEY v. METROPOLITAN LIFE INSURANCE CO.

Where the pleading does not show that an instrument of which profert is made is under seal oyer is not demandable.

Even though oyer is not demandable if it appears that a knowledge of the paper is proper or necessary for either party, it is the practice of the court to make an order for its production.

Where a state statute regulates the practice in making such application, that practice will be followed in the federal courts.

MOTION for production and filing of certain papers.

W. T. Angell and C. Bradley, for plaintiff.

W. G. Roelker, for defendant.

The opinion of the court was delivered by

CARPENTER, J.—This is an action on a policy of life insurance, and the defendant files several pleas setting out that the statements and answers to certain questions contained in the application and medical examination, which form part of the contract of insurance, are untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. The plaintiff now moves for an order on the defendant to file the application and medical examination in the clerk's office.

The motion is not properly framed as a demand of oyer, since the order granting oyer would provide only that the plaintiff have a copy of the instrument and not that the original instrument be put on file. The motion has, however, been argued as though it were a proper demand of oyer, and in that light I have considered it. In the first place it is to be noted that the plea does not show that the agreement is under seal, and consequently profert was unnecessary and oyer cannot be granted.

The authorities cited by the defendant abundantly sustain this position: 1 Chit. Pl. *430, *431; *Sneed v. Wister*, 8 Wheat. 690. Indeed, the order here asked seems to be prohibited by implied exclusion by the twenty-third law rule for this circuit, which reads as follows:

“Oyer of all specialties declared on may be had on motion at the return term, but not afterwards, unless by special order of court on affidavit of special cause.”

It was, however, the practice of the English courts, and is the practice with us, in cases where oyer is not demandable, but in which the court can see that a knowledge of the instrument in question is proper and necessary for either party, to make an order that he have a copy.

But in the practice of the courts of Rhode Island, which is followed in this court, the proceeding to be taken in order to obtain an order of this kind is prescribed by the law of the state in Pub. Stat. cap. 214, sect. 45, which is as follows:

“Whenever either party to any proceeding at law or equity in the Supreme Court, or to any proceeding at law in the Court of Common Pleas, shall set forth in writing under oath, upon his knowledge or belief, that the opposite party is in the possession or control of some document to which the applicant is entitled, such court or a

justice may order such opposite party, or if the same be a body corporate, then some officer thereof, to make answer on oath, at or before a time to be fixed in said order, as to what document he so has to the matter in dispute between the parties, or what he knows as to the custody of such document, and if in his possession or control whether he objects to the production of the same and the grounds of such objection, and thereupon such court or justice may require the production of said document, or may compel the party having the same in his possession or control to allow the applicant to inspect the same, and if necessary to take examined copies of the same, and may make such further order thereon as shall be just.

This present motion is not framed in accordance with the statute and it must be dismissed.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF GEORGIA.²

COURT OF ERRORS AND APPEALS OF MARYLAND.³

COURT OF ERRORS AND APPEALS OF NEW JERSEY.⁴

SUPREME COURT OF OHIO.⁵

BANK. See *Corporation*.

BROKERS.

Right to Commissions.—Brokers in whose hands property is placed for sale, in order to earn commissions on account of the sale of such property, must either have sold it or been the procuring cause of the sale. If the purchaser, who was spoken to by them, had abandoned all idea of the trade, and they had no influence at all in bringing it about, they would not be entitled to commissions, although the purchaser may subsequently have bought from the owner: *Doonan v. Ives*, 71 or 72 Ga.

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 113 U. S. Rep.

² From J. H. Lumpkin, Esq., Reporter; the cases will probably appear in 71 or 72 Ga. Rep.

³ From J. Shaff Stockett, Esq., Reporter; to appear in 62 Md. Rep.

⁴ From Hon. John H. Stewart, Reporter; to appear in 39 N. J. Eq. Rep.

⁵ From E. L. DeWitt, Esq., Reporter; the cases will probably appear in 41 or 42 Ohio St. Rep.

COMMON CARRIER.

Passenger Train—Fare of Child—Ejection from Railway Train—Measure of Damages—Punitive Damages.—A passenger on a railway train is responsible for the fare of a child under his charge, and upon refusal to pay the same, may, together with the child, be ejected from the train, although he had paid his own fare: *Phila., Wil. and Balt. Railroad Co. v. Hoeflich*, 62 Md.

If a conductor on a railway train finds a child sitting beside a female passenger, and knows that the father of the child is in the car, or could know upon proper inquiry, he has no right to hold the female passenger responsible for the child's fare: *Id.*

A passenger wrongfully ejected from a railway train is entitled to recover from the railway company such damages as in the judgment of the jury, under all the circumstances of the case, would be a proper compensation for the unlawful invasion of his rights as a passenger, and for the injury to his person and feelings: *Id.*

A passenger on a railway train, though forcibly and wrongfully ejected from the train by an officer of the railway company, is not entitled to punitive damages, if the wrongful act were committed in the discharge of a supposed duty, or without any evil or bad intention: *Id.*

To entitle a person to punitive damages for a wrongful act, there must be an element of fraud or malice, or evil intent, or oppression, entering into and forming part of the act: *Id.*

CONSTITUTIONAL LAW.

Local Law—General Law Local in form.—The clause of the constitution providing that "all laws of a general nature shall have a uniform operation throughout the state," is not directory but mandatory, and a statute in violation of it is void: *Ex parte Falk*, 41 or 42 Ohio St.

A statute providing punishment for an act which is *malum in se* wherever committed, being a law of a general nature, cannot be made local on the ground that the inhibited act is a greater evil in a large city than in other parts of the state: *Id.*

Rev. Stats., sect. 1924, which provides punishment by fine and imprisonment against any person found in any city of the first grade of the first class, or within four miles thereof, having burglar's tools in his possession, is a law of a general nature within the inhibition of the constitution, but being local in form it is void: *Id.*

CORPORATION.

Liability of Trustees or Directors for failure to file Report.—Where a state statute required that every manufacturing, &c., corporation formed under it should publish and file a report of its capital and debts within twenty days after the first of the year; and provided that in case of failure to do so all the trustees of the company should be liable for "all the debts of the company then existing." *Held*, where there had been such a failure, that the trustees were not liable for the amount of a judgment recovered in a suit in tort against the company before the first of the year in question: *Chase v. Curtis*, S. C. U. S., Oct. Term 1884.

Fraud of Officer—Liability of Corporation.—Where a transaction with an incorporated banking association properly pertains to the business of such an association, neither the abuse or disregard of his authority by its managing officer or agent, nor his fraud or bad faith will be permitted to be shown in defence of such bank in an action against it by an innocent party growing out of such transaction: *Citizens' Sav. Bank v. Blakesley*, 41 or 42 Ohio St.

DAMAGES. See *Common Carrier*.

DIVORCE. See *Husband and Wife*.

DOMICILE. See *Husband and Wife*.

EQUITY. See *Specific Performance*.

Bond of Trustees—Injunction against Suit.—Where the trustees of a corporation gave a bond, secured by a mortgage on the corporate property, which, in strict legal effect, bound them individually, a court of equity will enjoin an action at law against them thereon, if it appears that there was no intention on their part to become personally liable: *Mups v. Cooper*, 39 N. J. Eq.

Agreement between Father and Sons—Allowance for Services.—It appearing that two sons had worked their father's farms, under an agreement that they should do so until they had accumulated for him a fund of \$12,000, and then they should have the farms free of rent during his life, and that the specified sum had been gathered about a year before the father's death, and thereafter the sons had enjoyed the use of the farms free until their father died: *Held*, that the sons had no reason to complain, on appeal, that the chancellor had made too small an allowance to them for services rendered under that contract: *Larison v. Polhemus*, 39 N. J. Eq.

Parties who, in their pleadings and proofs, have insisted that they were not accountable to him for the rental value of land of which the ancestor died seised, because they were in possession as equitable owners, cannot, at the hearing, shift their ground, and claim that they were tenants of the ancestor's widow, who might have been entitled to hold the land until her dower was assigned, but who has disclaimed such a right: *Id*.

FRAUDS, STATUTE OF.

Promise to Pay for Goods Furnished to Another—Original Undertaking.—G. wished to procure credit from P., but was refused. M., who had G. in his employment at the time, told P. to let G. have goods and he would see it paid. The credit was given to M. and was refused to be given to G.: *Held*, that such promise on the part of M. was an original undertaking, and not an agreement to answer for the debt or default of another. His promise to see it paid was the same as a promise to pay it himself, and so both parties understood the transaction at the time: *Maddox v. Pierce*, 71 or 72 Ga.

HUSBAND AND WIFE.

Purchase by Wife at Judicial Sale—Personal Liability—Power to bind separate Estate.—A married woman who purchases real estate at a

trustee's sale, made under the sanction and direction of a court of equity, and who pays a part of the purchase-money, but fails to pay the balance, is personally liable therefor: *Fowler v. Jacob*, 62 Md.

A decree in personam against a feme covert, as purchaser of real estate sold under a decree in equity, to enforce the payment of the balance of the purchase-money, means only, that unless by a given time she pays such balance, any of her separate property which she would have the right to pledge in order to pay or secure a debt, may be taken in execution to pay what she owes on her purchase, or that such property is liable therefor: *Id.*

A married woman has the power to charge her separate property with the payment of her debts, and whether she does so or not, is a question of intent: and this intent may be shown on the face of the obligation creating the debt, or it may be shown aliunde: *Id.*

Divorce—Wife's Counsel Fees—Liability of Estate of Deceased Husband.—A widow cannot maintain an action against the administrator of her deceased husband, for the amount of the fees charged by her counsel for prosecuting a suit against him for a divorce *a mensa et thoro*, pending which suit he died: *McCurley v. Stockbridge*, 62 Md.

But counsel themselves are entitled to recover from the administrator of the deceased husband, reasonable fees for services rendered the wife in a suit against the husband for a divorce, if it be made to appear affirmatively that the suit was reasonably and justifiably instituted: *Id.*

Assignment of Account to Wife.—A son advanced money to his mother for her support during her life, under an agreement that he should be repaid at her death out of her estate. The son procured from his wife the money advanced, agreeing that she should have the account against his mother. Equity will enforce the claim in behalf of the wife: *Titus v. Hoagland*, 39 N. J. Eq.

The parol assignment to the wife being unknown to the mother, a counter-claim which she had against her son at her death will be set off against this claim of the wife: *Id.*

Domicile—Descent of Property—Community.—Under the laws of France, by a marriage without a contract as to property, a community of property between the husband and wife is established as an incident of the marriage. During coverture the husband has the control and management of the community property, and he may dispose of his share of the common property by his will; but the wife's share—that is, the one-half of the community property—the husband cannot dispose of, and she will be entitled to it on his death: *Harral v. Harral*, 39 N. J. Eq.

A person *sui juris* may change his domicile as often as he pleases. To effect such a change, naturalization in the country he adopts as his domicile is not necessary: *Id.*

To effect a change of domicile there must be a voluntary change of residence; the residence at the place chosen for the domicile must be actual; to the *factum* of residence there must be added *animus manendi*, and that place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless, or until some-

thing uncertain or unexpected shall happen to induce him to adopt some other place as his permanent home: *Id.*

By the laws of France, the marriage of a foreigner in France without any contract as to property, followed by the establishment of a conjugal domicile in that country, will subject the property of the married persons to the community law, and a government authorization under article xiii. of the code is not necessary to the establishment of such a domicile: *Id.*

H., whose birthplace was in Connecticut, went to Europe in 1869, for the purpose of acquiring the German language, and completing his professional studies. In 1872 he went to Paris, where he remained; and, in February 1877, married a French woman in Paris, without any contract as to property. Immediately after the marriage he rented a house at Suresnes, a village near Paris, for two years, and took up his residence there with his wife. In May 1878, he was brought to this country, and sent to a hospital for the insane, at Philadelphia, where he died in 1881. *Held*, that by his marriage in France, and the establishment of his conjugal domicile there, his personal property became subject to the community law, and that his widow, on his death, was entitled to the one-half part thereof, notwithstanding that by his will, made before the marriage, he had bequeathed the whole of it to others: *Id.*

INJUNCTION. See *Equity*.

When it will Issue to Restrain Waste on Property in Litigation.—Where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, an injunction may issue to restrain the same as waste, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title: *Ehardt v. Boaro* (No. 2), S. C. U. S., Oct. Term 1884.

INSURANCE.

Mutual Beneficial Society—Payment to Family or Heirs—Right to Appoint by Will.—A certificate of membership issued by an association organized under the provisions of the Revised Statutes, sect. 3630, "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members," which, by its terms, is made payable to the assured member, "or any person designated by his will or his heirs, if no person is designated herein or by will," within ninety days after proof of death of the assured member, does not authorize such member, by testamentary appointment, to constitute a person a beneficiary of such insurance, who is not of the family of the assured, or may not, upon his death, become his heir: *Nat. Mut. Aid Assoc. v. Gonser*, 41 or 42 Ohio St.

A bequest by an assured member of such a company, of the proceeds of his certificate of membership to a stranger or a creditor, does not constitute such legatee an "heir" of the testator, in the statutory sense of that term: *Id.*

Warranty—Avoidance of Policy by False Statement—Fraudulent Intent Necessary.—Where a policy of insurance provides that any false
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swearing or attempt at fraud, "or if there shall appear any fraud in the claim, by false swearing or otherwise," shall avoid such policy, the company, in order to avail itself of the defence, must show that the assured knowingly and intentionally swore falsely, or said or did that which is claimed to be fraudulent. There must be a wilful intent to defraud, rather than an innocent mistake; and this condition of the policy extends to every matter material to be stated, or which the policy in terms requires to be stated: *Watertown Fire Insurance Co. v. Grehan*, 71 or 72 Ga.

LIMITATIONS, STATUTE OF.

Prescription—Wrongful Occupation of Land.—If a person takes possession of land which he knows does not belong to him or any one from whom he purchases, no prescription will run in his favor, however long he may hold possession of the same. His possession, under such circumstances, originated in fraud, and time will not cure or sanctify the fraud: *Cowart v. Young*, 71 or 72 Ga.

Continuing Nuisance.—Every continuance of a nuisance is a renewal of the wrong, and is actionable until abated. It is a nuisance to keep up a sewer which, when it rains, throws upon a lot, and near the house where the owner resides, excrement disagreeable to the smell, and hurtful to health, and an action therefor, should not have been dismissed, although the digging of the sewer was more than four years before the bringing of the suit: *Reid v. Atlanta*, 71 or 72 Ga.

Mutual Accounts.—A mutual account is one based on a course of dealing, wherein each party has given credit to the other, on the faith of indebtedness to him: *Gunn v. Gunn*, 71 or 72 Ga.

If the items in favor of one side are mere payments on the indebtedness to the other, the account is not mutual: *Id.*

In cases of such mutual accounts, the statute of limitations does not begin to run against either party, until the last just item in the account on either side: *Id.*

This doctrine rests, not on the notion that every credit in favor of one is an admission by him of indebtedness to the other, or a new promise to pay; but upon a mutual understanding, either express or implied from the conduct of both parties, that they will continue to credit each other until at least one desires to terminate the course of confidential dealing; and that the balance will then be ascertained, become then due, and be paid by the one finally indebted: *Id.*

As this state of things rests on an express or implied mutual understanding, either party may terminate it, at any time, by an actual payment of the balance; or by stating the account for that purpose; or by demanding a settlement privately; or by suit; or by any act which plainly shows to the other party his determination to deal no longer that way: *Id.*

Without proof of its termination the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties, until the complete bar of the statute has attached: *Id.*

MASTER AND SERVANT.

Act of Servant—Responsibility of Master—Course of Employment.—A master is not responsible for the acts of his servant, unless the latter

was engaged in the performance of the service for which he was employed: *Adams v. Cost*, 62 Md.

Where a person placed his mare at livery, and instructed a servant of the proprietors of the stable, to take her out for exercise, such, however, being no part of the contract of livery, and while the servant had her out for such purpose she died, the proprietors of the stable cannot be held liable to the owner, though the mare was injured by, and died in consequence of, the immoderate riding and carelessness of their servant: *Id.*

MINES AND MINING.

Discovery and Location—Notice of.—The discoverers of a lode or vein posted at the point of discovery a plain sign, or notice in writing, the body of which was as follows: "We, the undersigned, claim 1500 feet on this mineral-bearing lode, vein or deposit." *Held*, that this meant that they claimed 750 feet on the course of the lode or vein in each direction from that point, and that the notice was not deficient: *Erhardt v. Boaro*, S. C. U. S., Oct. Term 1884.

MORTGAGE.

Time of Recording—Presumption as to Lien—Notice.—The presumption is, that the mortgage first recorded is the first lien; and to overcome such presumption, it must be proved that the mortgagee of the mortgage first of record, at or before the time he took his mortgage, had knowledge of the existence of the mortgage first in date: *Hendrickson v. Woolley*, 39 N. J. Eq.

The notice, if any, must be taken with the qualifications attached to it by the agreement of the mortgagee of the unrecorded mortgage; and if such mortgagee has agreed with the mortgagor to keep his mortgage off the record, in order that the mortgagor may borrow more money on the property to be secured prior to such mortgage, and such agreement be made known to the mortgagee of the mortgage second in date, but first of record, at or before its execution, such notice will not give the unrecorded mortgage priority: *Id.*

In such case the priority of the mortgage first in date is waived: *Id.*

MUNICIPAL CORPORATION. See Will.

Subscription to the Stock of a Railroad—Special Tax for Payment of the Debt thereby Incurred.—A provision in a city charter provided that the city council should have power to levy taxes on all property within the city "to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof." Subsequently the city was authorized to subscribe to the capital stock of a railroad, and issued bonds in payment of the stock it subscribed for. *Held*, that despite the limitation in the charter, the authority to make the subscription for the stock carried with it the right and the duty to levy and collect a special tax, if necessary, to pay the debt incurred by the subscription: *Quincy v. Jackson*, S. C. U. S., Oct. Term 1884.

Negligence—Exercise of Police Powers—Liability for Failure to Perform.—In relation to powers and privileges which are to be exercised by a municipal corporation for the improvement of the territory

within the corporate limits, and as to which the pecuniary and proprietary interests of individuals are represented, the liability of the corporation for negligence is largely, if not entirely, measured by the liability of individuals for similar acts; but with respect to police powers, such as suppressing riots and unlawful assemblages, such corporation is, in the absence of statutory provision to the contrary, the agent of the state, and not liable for a failure to perform or negligence in performing duties in that particular imposed by statute: *Robinson v. Greenville*, 41 or 42 Ohio St.

An assemblage of disorderly persons, after having been engaged for several hours in discharging a cannon in a public street of a municipal corporation, seriously injured a resident of the corporation, himself without fault, by one of such discharges: *Hekl*, that such corporation is not liable for the injury, although the statute provides that the council shall have the care, supervision and control of the streets, "and shall cause the same to be kept open and in repair, and free from nuisance" (Rev. Stats., § 2640), and it will make no difference that the authorities of such corporation, with knowledge of such firing, took no steps to prevent the same: *Id.*

Streets—Shade Trees—Right to Remove.—Shade trees on the sidewalks and streets of a city belong to it, and in grading the streets and sidewalks, they may be removed if necessary; and an adjoining property owner certainly cannot recover therefor unless such damage was caused by negligence or carelessness in the work: *Castleberry v. Atlanta*, 71 or 72 Ga.

NATIONAL BANK.

Taxation of Shares—At what relative Rate.—Under Sect. 5219 of the Revised Statutes, the taxation of the shares of a national bank imposed by authority of the state within which the association is located, is not to be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." That the taxation imposed upon capital invested in national bank shares is no heavier than that imposed upon capital invested in state bank shares, or in state savings institutions, does not prevent its being an illegal discrimination, if it results in the capital so invested not being upon the same footing of substantial equality in respect of taxation by state authority as the state establishes for other moneyed capital in the hands of individual citizens, however invested: *Boyer v. Boyer*, S. C. U. S., Oct. Term 1884.

NEGLIGENCE. See *Master and Servant*; *Municipal Corporation*.

Railroad—Right to Track—Trespass—Negligence—Violation of City Ordinance.—The right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has a right to be; and any one who travels upon such right of way as a foot-way, and not for any business with the railroad, is a wrongdoer and a trespasser; and the mere acquiescence of the railroad company in such user, does not give a right of way over the track, or create any obligation for special protection: *Balt. and Ohio Railroad Co. v. State*, 62 Md.

Where a person trespassing upon such right of way was run over by a train of cars and killed; and the place where the accident occurred, though within the corporate limits of the city of Baltimore, was not

upon any street or public way where the person killed had a right to be, it was held, that in the absence of other acts of negligence on the part of the agents of the railroad company, the non-compliance with a city ordinance requiring that "when a locomotive engine is used within the limits of the city, a man shall be required to ride on the front of the locomotive engine when going forward, and when going backward, on the tender, not more than twelve inches from the bed of the road," did not, per se, amount to such omission of a general and imperative duty toward the deceased, as would render the company liable in an action for damages resulting from his death: *Id.*

Railroad—Crossing Track—Contributory Negligence—Flagmen—Duty to Look and Listen—Presumption.—The general principle is, that where both parties by their negligence directly contribute to the production of the accident, neither has a right to recover of the other for injuries sustained thereby. But there are exceptions to this general rule; and if the defendant or those acting for it, had become aware of the perilous situation of the plaintiff, though that peril had been incurred by his negligent or even reckless conduct, yet the defendant or its agents would be bound to use all reasonable diligence to avoid the accident: *Maryland Central Railroad Co. v. Neuber*, 62 Md.

But in order that this qualification of, or exception to, the general rule, may be successfully invoked by the plaintiff, he must show knowledge on the part of the defendant, or its agents, of the peril in which he, the plaintiff, was placed, and that there was time after such knowledge within which to make the effort to save him from the impending danger: *Id.*

In the absence of statutory requirement it is now well settled, at least by a great preponderance of authority, that there is no legal obligation on a railroad company to keep at the crossings of the public country roads flagmen to give warning to travellers on such roads of the passing of trains: *Id.*

Travellers about to cross a railroad track, should, in all cases, before proceeding to cross, carefully look and listen, to ascertain whether a train is approaching; and the failure on the part of those in charge of the train to give the usual or required signals, such as blowing the whistle or ringing the bell, will not excuse or justify the traveller on the country roads, in attempting to cross a railroad track without the exercise of that reasonable precaution, of looking and listening for the approach of a train. And if the experiment be made without such precaution, the party acts at his peril; and, if an accident occurs by a collision with a passing train, the traveller must be held to have so far contributed to his own misfortune as to preclude him the right to recover against the railroad company: *Id.*

But if it be established as a fact, that the defendant, after discovering the perilous situation of the plaintiff, could, by the exercise of reasonable care, have avoided the collision, the want of care by the plaintiff in driving upon the track, would be no answer to his right to recover: *Id.*

While it is natural, and as a general rule rational, to presume that a party acts from incentives of self-preservation, this presumption can only be indulged in the absence of proof to the contrary: *Id.*

NEGOTIABLE INSTRUMENT.

Bonds of the United States—Negotiable although called.—The five-twenty United States consols of 1865 on their face were "Redeemable at the pleasure of the United States after the 1st day of July 1870, and payable on the 1st day of July 1885." The Act of July 14th 1870, which authorized the Secretary of the Treasury to "call" them, required a public notice, and provided that in three months after the date thereof, interest should cease. *Held*, that the bonds continued negotiable after the expiration of the said three months, until the period at which they were originally made payable; and that therefore the bona fide purchaser of such bonds, which had been stolen, had a good title: *Morgan v. United States*, S. C. U. S., Oct. Term 1884.

ORDINANCE. See *Negligence*; *Sunday*.

Patent—Re-issue for the Purpose of Enlarging the Claim—A Clear Mistake and Promptness both Necessary.—In order to obtain a re-issue of a patent for the mere purpose of enlarging the claim, there must be both a clear mistake, inadvertently committed, in the wording of the claim and an application for the re-issue within a reasonably short time. Therefore, in this case, the court, being of opinion that there was no mistake in the wording of the claim of the original patent, held the enlarged claims of the re-issue invalid, although the re-issue was applied for a little over three months after the original patent was granted. *Coon v. Wilson*, S. C. U. S., Oct. Term 1884.

Use of an old Device for a new Purpose.—Where the public has acquired in any way the right to use a machine or device for a particular purpose, it has the right to use it for all the like purposes to which it can be applied. If there is any qualification of this rule, it is that if a new and different result is obtained by a new application of an invention, such new application may be patented as an improvement on the original invention; but if the result claimed as new is the same in character as the original result, it will not be deemed a new result for this purpose: *Blake v. City and County of San Francisco*, S. C. U. S., Oct. Term 1884.

PAYMENT.

Check of Third Party.—To pay for a bill of goods, the buyer sent to the seller a check, drawn by one bank upon another, endorsed by the buyer to whose order the check was payable, and the seller on receiving it, sent back to the buyer a receipt acknowledging payment of the bill. At the time of sending the check by the buyer, and the receipt by the seller, it was supposed by the buyer and seller that it was good, but in fact there were no funds of the drawer in the hands of the drawee subject to the payment of the check at the time it was drawn or afterwards. *Held*, that in an action on an account for goods sold and delivered, a plea of payment cannot be maintained on the facts above stated: *Fleig v. Sleet*, 41 or 42 Ohio St.

RAILROAD. See *Negligence*; *Common Carrier*.

Power to Connect—Right to run through City—Terminus of Route.—A charter which authorized a railroad company to run its road from the

boundary between the states of South Carolina and Georgia to the city of Augusta, and, with the assent of the railroads in this state, to join its track to theirs, did not confer upon it the power to run its road through the city of Augusta so as to connect with another railroad. In order to do this express authority must be granted by the legislature: *City Council v. Port Royal and Augusta Railway*, 71 or 72 Ga.

REMOVAL OF CAUSES.

Objection that the Application was too late may be Waived.—Sect. 3 of the Act of March 3, 1875, prescribing the time when a petition for removal may be filed, &c., is not jurisdictional but modal and formal; application in due time and the proffer of a proper bond, as required by it, may be waived, either expressly or by implication; and the party at whose instance a removal has been effected, is estopped from objecting that the application therefor was too late; *Ayers v. Watson*, S. C. U. S., Oct. Term 1884.

SLANDER.

Testimony of Witness—Privileged Communication.—In an action of slander the petition charge defendant with having spoken certain false, malicious and defamatory words concerning the plaintiff, while giving his testimony before a court having jurisdiction of the subject-matter then on trial, in answer to interrogatories put to him as such witness. For aught that is stated in the petition, these answers were relative to the issue then on trial, and were honestly believed to be true, though in fact they were untrue. Upon demurrer to the petition, *held*, 1st. That the court will presume, in the absence of an averment to the contrary, that the answers of the witness were within the scope of inquiry pertinent to the issue then on trial, and that they were believed by the witness to be true. 2d. That upon the statements of the petition and the presumptions arising therefrom, the witness was absolutely privileged, and he is not liable to a civil action for so testifying: *Liles v. Gaston*, 41 or 42 Ohio St.

SPECIFIC PERFORMANCE.

Contempt—Enforcement of Decree.—When, on decree for specific performance, the defendant is in contempt for refusal to perform, the court may give it effect by establishing the contract as if it had been executed; and by enjoining and restraining the defendant from denying its execution and delivery; and from defending himself in any action by denying its execution: *Wharton v. Stoutenburgh*, 39 N. J. Eq.

Such substituted decree, made while the defendant is in contempt, may be without notice, but he has the right of appeal therefrom: *Id.*

STATUTE. See Constitutional Law.

Construction—Punctuation.—In construing a statute, punctuation may aid, but does not control, unless other means fail; and in rendering the meaning of a statute, punctuation may be changed or disregarded: *Albright v. Payne*, 41 or 42 Ohio St.

Judicial cognisance of Local Law.—It is the duty of the courts to take judicial cognisance of public local laws, within the sphere of their operation, equally with public general laws: *Slymer v. Maryland*, 62 Md.

STREET. See *Municipal Corporation*.

SUNDAY.

Publication of Ordinance on.—Publication of the preliminary and other ordinances, with respect to a street improvement, in a newspaper of general circulation, in accordance with the terms of the statute, is a valid and legal publication, although such newspaper is only published on Sunday : *Hastings v. City of Columbus*, 41 or 42 Ohio St.

TAX AND TAXATION. See *Municipal Corporation* ; *National Bank*.

TRUST. See *Will*.

TRUSTEES.

Orphans' Court—Opening Account.—The orphans' court has the power to open a decree settling an intermediate account of trustees, in which it appears that commissions were allowed in excess of the sum fixed by the statute : *Jackson v. Reynolds*, 39 N. J. Eq.

USURY.

Suit by Principal after Payment of Debt.—Where a principal debtor conveyed land to his surety, to indemnify him against loss, and, after the debt had been reduced to judgment and a levy made, the surety paid off the execution, and thereupon brought ejectment against his principal to recover the land, it was no defence to this action to allege that there was usury in the contract between the principal and the original creditors. The deed from the principal to the surety was not tainted with usury in the contract between the principal and his creditors ; and as between them, the judgment fixed the indebtedness : *Maples v. Cox*, 71 or 72 Ga.

WILL.

Devise—Condition as to Membership of Religious Order—Public Policy—Trust—Charity—Municipal Corporation—Equity.—It is not against public policy to make a devise or bequest dependent upon the condition that the legatee should withdraw from the priesthood, or membership of any order or society connected with the Roman Catholic Church, or refrain from forming any such connection ; and testator has the right to make the enjoyment of his bounty dependent upon such condition attached to it : *Barnum v. Mayor, &c., of Baltimore*, 62 Md.

Under its charter, the city of Baltimore has the power to accept and hold in trust, any property for educational and charitable purposes : *Id.*

Where property is held by a municipal corporation in trust, or where the trust reposed in the corporation is for a charity within the scope of its duties, a court of chancery will prevent the misapplication of the trust funds, and compel the execution of the trust. And this jurisdiction is not founded upon the statute of 43 Elizabeth, ch. 4, but is a part of the original inherent jurisdiction of the court of chancery over the subject of trusts : *Id.*

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MARRIED WOMEN TRADERS.

THE discussion of this subject will fall under two main heads, first, the sources of married women's capacity to trade, how far they could trade at common law and in equity, and the effect of modern statutes; and second, the incidents of married women's capacity to trade—their rights, powers, obligations and disabilities, when engaged in trade under some common law, equitable or statutory capacity. Many points not directly involved must be referred to for the purpose of argument and illustration, and on such points the cases are not collected in this paper.

I. SOURCES OF MARRIED WOMEN'S CAPACITY TO TRADE.

Sect. 1. *General view.*—(a). *At Common Law generally*, a married woman could make no contract whatever; *Norris v. Lantz*, 18 Md. 260, 269; all her time and labor belonged to her husband (*Seitz v. Mitchell*, 94 U. S. 580, 584), as did all the present enjoyment of her property. See *Mann's Appeal*, 50 Penn. St. 375, 381. She had in fact no legal existence apart from her husband: *White v. Wager*, 25 N. Y. 325, 328; therefore she could not trade at all: *Carey v. Burruss*, 20 W. Va. 571, 575; 43 Am. Rep. 790; see *Bradstreet v. Baer*, 41 Md. 19, 23; *Netterville v. Barber*, 52 Miss. 168, 171; *McKinnon v. McDonald*, 4 Jones' Eq. 1. If a female trader married, the trade became her husband's (*Ashworth v. Outram*, L. R., 5 Ch. Div. 923, 929), and if she had been trading as partner, the partnership was dissolved: *Alexander v. Morgan*, 31 Ohio St. 546, 550. But when owing to her husband's

abandonment of the state, &c., she had the capacities of a feme sole (see *Stewart Mar. & Div.*, sect. 177), and in some places by custom (*Carey v. Burruss*, 20 W. Va. 571, 575, 43 Am. Rep. 790), a married woman could trade as if unmarried.

(b). *Wife's Earnings*.—As a married woman could not contract at all by the common law, she could not enter into any kind of engagement or employment on her own account, but all her time, services, wages and earnings of every kind, belonged to her husband: *Cecil v. Juxon*, 1 Atk. 278, 279; *Glenn v. Johnson*, 18 Wall. 476, 478; *McLemore v. Pinkston*, 31 Ala. 267, 270; *Hinman v. Parkis*, 33 Conn. 188, 197; *Hazelbaker v. Goodfellow*, 64 Ill. 238, 241; *Cranor v. Winters*, 75 Ind. 301, 303; *Glover v. Alcott*, 11 Mich. 471, 482; *Raybold v. Raybold*, 20 Penn. St. 308, 311; *Hallowell v. Horter*, 35 Id. 375, 380. Still her husband could agree that she should have her earnings, just as he could invest her with any property of his, except as against his creditors, and his agreement would be enforced in equity: *McLemore v. Pinkston*, 31 Ala. 267, 269; *Peterson v. Mulford*, 36 N. J. L. 482, 487; *Hoyt v. White*, 46 N. H. 45, 47; *Elliott v. Bentley*, 17 Wis. 591, 596. His agreement, however, could give her no personal capacity, but only the right, in his place and stead, to collect and keep the wages or rewards of her labors: *Uhrig v. Horstman*, 8 Bush 172, 177; *Stewart Mar & Div.*, sect. 181. So by statute, in most states, the wife's earnings are secured to her separate use: see *Martin v. Robson*, 65 Ill. 129, 135, 16 Am. Rep. 578. These statutes were passed to protect wives from shiftless, improvident and dissipated husbands (*Youngworth v. Jewell*, 15 Nev. 45, 47), and were in form the earliest of the statutes relating to the trade of married women.

(c) *The Increase of Wives' Separate Property*.—Although at common law all the interest, profits, rents and increase of a married woman's property vested in the husband just as the property itself did, except that the rents and profits of real estate vested in him as personalty, she had her separate estate first in equity and then by statute, and the increase of such estate was also separate property: *Gore v. Knight*, 2 Vern. 535; *Barrack v. McCulloch*, 3 Kay & J. 110, 119; *Hoot v. Sorrell*, 11 Ala. 386, 399, 404; *Sanford v. Atwood*, 44 Conn. 141, 143; *Bongard v. Core*, 82 Ill. 19, 21; *Stout v. Perry*, 70 Ind. 501, 504; *Russell v. Long*, 52 Iowa 250, 252; *Hanson v. Millett*, 55 Me. 184, 189; *Hill v.*

Chambers, 30 Mich. 422, 429; *Williams v. McGrade*, 13 Minn. 46, 52; *Hutchins v. Colby*, 43 N. H. 159, 161; *Knapp v. Smith*, 27 N. Y. 280; *Holcomb v. Meadville*, 92 Penn. St. 338, 343; *Nelson v. Hollins*, 9 Baxt. 553, 554; *Braden v. Gose*, 57 Tex. 87, 40; *Dayton v. Walsh*, 47 Wis. 113, 118; and therefore the products of all investments or uses of her separate property, though such products result in part from her own efforts and from the labor, skill and knowledge of her husband: *Aldridge v. Muirhead*, 101 U. S. 397, 399; *Stout v. Terry*, 70 Ind. 501, 504; *Cooper v. Ham*, 49 Id. 393, 400; *Langford v. Grierson*, 5 Bradf. 361, 365; *Russell v. Long*, 52 Iowa 250, 252; *Miller v. Peck*, 18 W. Va. 75, 79-97. In a sense, therefore, as will be shown below, she can trade with her separate property.

(d). *Summary of Sources*.—So that a married woman may be found on her own account earning money, trading or in business—the meaning of these words will be defined below—by virtue (1) of her right to her *earnings*, depending on her husband's consent or on statute; or (2) of her ownership of equitable or statutory *separate property*; or (3) of her capacities as a *feme sole*, due to the peculiar conduct of her husband or to statute; or (4) of her capacity to *trade*, due to custom or to statute.

SECT. 2. *Definitions*.—*Earnings, Trade, Business, etc.*—Although the distinction between personal earnings and the increase of property is quite clear (see *Mitchell v. Sawyer*, 21 Iowa 582, 583; also, *supra*), and for this reason, as hereinafter shown, married women's separate property acts do not destroy a husband's rights to his wife's personal services: *Glover v. Alcott*, 11 Mich. 470, 480; it is very hard to draw any line between personal earnings and the profits of trade in which property is used. See *Haight v. McVeagh*, 69 Ill. 624, 629; *Dayton v. Walsh*, 46 Wis. 113, 120. The terms used in the books in connection with married women's trade are not sharply defined, and their meaning has given rise to considerable discussion.

(a). *Earnings*.—"Earnings" are what is earned, gained or merited by labor, services or performances, wages or reward: *Dayton v. Walsh*, 47 Wis. 113, 120; and the earnings secured to a married woman by a statute are not confined to the results of manual labor—to wages for washing or sewing—but include the products of trade also: *Haight v. McVeagh*, 69 Ill. 624, 628; and the stock in trade of a married woman, bought with her earn-

ings, is included within the term earnings: *Lovell v. Newton*, L. R., 4 C. P. Div. 7, 11, 12.

(b). *Trade and Business*.—"Trade" or "business" means an employment to which the party devotes a considerable portion of her time, skill and means (*Holmes v. Holmes*, 40 Conn. 117, 119)—a business that is continuing in its nature and embraces many transactions: *Holmes v. Holmes*, 40 Conn. 117, 119; *Proper v. Cobb*, 104 Mass. 589, 590). Engaging in trade and business means not only trading in a commercial sense, but also being engaged in other employments which require time, labor and skill: *Netterville v. Barber*, 52 Miss. 168, 171; it means engaging in a business pursuit, mechanical, manufacturing or commercial: *Nash v. Mitchell*, 71 N. Y. 200, 203. To illustrate: Though a single transaction may be a business one, it does not make the party a trader: *Holmes*, 40 Conn. 117, 119; *Netterville v. Barber*, 52 Miss. 168, 171; horse-dealing may be a business, but a woman who buys or sells a single horse is not necessarily in that business: *Holmes v. Holmes*, 40 Conn. 117, 120; *Proper v. Cobb*, 104 Mass. 589, 590; so, farming may be a business, but employing a man to work on one's farm does not make one a farmer by trade: *Holmes v. Holmes*, 40 Conn. 117, 120; renting a house may be a business transaction, and for the purposes of trade: *Knowles v. Hull*, 99 Mass. 562, 564; but a lease of rooms is not necessarily the contract of a trader: *Holmes*, 40 Conn. 117, 119; so a married woman's receipt and disbursement of her rents and profits, though done in a business way, does not constitute her a trader: *Proper v. Cobb*, 104 Mass. 589, 590; *Nash v. Mitchell*, 71 N. Y. 200, 203; nor is she a trader when she is not acting generally with the public, but is simply taking care of her own property: *Proper v. Cobb*, 104 Mass. 589, 590; or collecting or investing her income: *Wheeler v. Raymond*, 130 Mass. 247, 248, 249; *Nash v. Mitchell*, 71 N. Y. 200, 203. When she may trade she is not confined to any particular trade: *Guttman v. Scannell*, 7 Cal. 455, 459; she may not only engage in washing or sewing (*Haight v. McVeagh*, 69 Ill. 624, 628), dressmaking or millinery (*Jassoy v. Delius*, 65 Id. 469, 471; *Tuttle v. Hoag*, 46 Mo. 38, 40), keeping a dairy (*Krouskop v. Shontz*, 51 Wis. 204, 205, 207), keeping a boarding-house (*Chapman v. Briggs*, 11 Allen 546, 547; *Dawes v. Rodier*, 125 Mass. 421, 423; *Harnden v. Gould*, 126 Id. 411, 412), keeping a grocery or provision store (*Haight v. McVeagh*, 69 Ill. 624, 628; *Abbey*

v. Deyo, 44 Barb. 374, 382), and in other pursuits specially adapted to her sex (*Guttman v. Scannell*, 7 Cal. 455, 459); but she may be a farmer (*Camden v. Mullen*, 29 Cal. 564, 566; *Snow v. Sheldon*, 126 Mass. 332, 323; *Chapman v. Foster*, 6 Allen 136, 138; *Abbey v. Deyo*, 44 Barb. 374, 382; *Krouskop v. Shontz*, 51 Wis. 204, 205, 207; but see *McDaniel v. Cornwell*, 1 Hill S. C. 428, 429), a miller (*Cooper v. Ham*, 49 Ind. 393, 416), a saloon or tavern-keeper (*Porter v. Gamba*, 43 Cal. 105, 108; *Nisipel v. Laparle*, 74 Ill. 306, 307; *Silveus v. Porter*, 74 Penn. St. 448, 449), a clothier (*Guttman v. Scannell*, 7 Cal. 455, 456; *Bellows v. Rosenthal*, 31 Ind. 116, 117), an ironmonger (*Abbey v. Deyo*, 44 Barb. 374, 382); she may work a mine or quarry, or may go into the lumber business: *Netterville v. Barber*, 52 Miss. 168, 172; though, if her trade is unsuited to her, this is a fact to be considered, if her husband's creditors are trying to show that the business is really his: *Guttman v. Scannell*, 7 Cal. 455, 459. So, she may engage in the professions—may devote her talents to literature, acting, singing (*Dayton v. Walsh*, 46 Wis. 113, 120); and, in fact, under a general power to trade, may follow any legitimate calling: *Guttman v. Scannell*, 7 Cal. 455, 459; *Haight v. McVeagh*, 69 Ill. 624, 628; *Chapman v. Briggs*, 11 Allen 546, 547.

(c). *Separate Trade*.—The trade of a married woman is usually spoken of as her “*separate*” trade; but the word “*separate*” refers rather to her independent status than to the mode in which she shall trade (*Zimmerman v. Erhard*, 58 How. Pr. 11, 14); and it does not mean that she shall trade alone, or prevent her living with her husband while trading (*Lovell v. Newton*, L. R., 4 C. P. D. 7, 12; *Newbrick v. Dugan*, 61 Ala. 251, 253; *Parker v. Simonds*, 1 Allen 258, 260), or allowing him to join in the business: *Guttman v. Scannell*, 7 Cal. 455, 459. In some states, however, it has been held that she must keep her business separate (*Haas v. Shaw*, 91 Ind. 384, 389, 396), or separate from her husband (*Lord v. Parker*, 3 Allen 127, 129), and that the joint and mingled earnings of husband and wife are his property: *Hawkins v. Providence*, 119 Mass. 596, 599.

Sect. 3. *Capacity to Trade at Common Law*.—At common law when a husband was civilly dead, had abjured the realm, etc., his wife had the status of an unmarried woman (see *Stewart Mar. & Div.*, sects. 175–178), and, therefore, could trade as such (*Carey*

v. *Burruss*, 20 W. Va. 571, 575, 43 Am. Rep. 790); and in some states there are statutes to this effect declaratory of the common law. See *Hannon v. Madden*, 10 Bush 664, 667; *Woodcock v. Reed*, 5 Allen 207, 208. So, by the custom of London and other places a married woman carrying on trade apart from her husband had the capacities of a *feme sole* (*Petty v. Anderson*, 2 C. & P. 38, 39; *Beard v. Webb*, 2 Bos. & P. 93, 97; *Lovie v. Phillips*, 3 Burr. 1776, 1783; *Netterville v. Barber*, 52 Miss. 168, 171; *Carey v. Burruss*, 20 W. Va. 571, 575; 43 Am. Rep. 790); but such a custom has never existed in this country (see *Jacobs v. Featherstone*, 6 W. & S. 346), except in South Carolina: (*McDaniel v. Cornwell*, 1 Hill S. C. 428, 429; *Newbiggin v. Pellans*, 2 Bay 162, 165; *Dial v. Neuffer*, 3 Rich. 78, 79.)

Sect. 4. *Capacity to Trade in Equity*.—In those states where a married woman is a *feme sole* in equity as to her equitable separate estate, she may use the same in trade, and the profits of such trade are equitable separate property likewise: *Johnson v. Gallagher*, 3 DeGex, F. & J. 494, 509; *Jarman v. Wooloton*, 3 Term 618, 622; *Conklin v. Doull*, 67 Ill. 355, 357; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Stevens v. Reed*, 112 Mass. 515; *Penn v. Whitehead*, 17 Gratt. 503, 512, 513; *Partridge v. Stocker*, 36 Vt. 108, 115; *Carey v. Burruss*, 20 W. Va. 571, 579; *Todd v. Lee*, 16 Wis. 480, 483; but in such trade she has no personal capacities: *Conklin v. Doull*, 67 Ill. 355, 357; *Tuttle v. Hoag*, 46 Mo. 38, 41; cases last cited. Equity recognises her separate existence only with respect to her separate property, and her contracts made in the course of her trade can be collected only if they have been properly charged on said property. See *Todd v. Lee*, 16 Wis. 480, 483. In those states where she has, as to her equitable separate property, only the powers expressly given her, she can, of course, exercise only such powers.

Sect. 5. *Capacity to Trade with consent of Husband*.—A husband cannot, by his consent, change the personal status of his wife (Stewart Mar. & Div., sect. 181), or enable her to trade with the capacities, rights and liabilities of a *feme sole* (*Uhrig v. Horstman*, 8 Bush 172, 177); but he may allow her, as his agent, to engage in business and to retain the profits (*Ashworth v. Outram*, L. R., 5 Ch. Div. 923, 931); or he may agree, before or after marriage, that she shall keep her earnings or carry on business for her own use (*Penn v. Whitehead*, 17 Gratt. 503, 512); and he

may give her, if he chooses, the necessary capital to start with: *Lockwood v. Collin*, 4 Robt. 129, 136. Any such gift of earnings, profits or property, is good, at least in equity, against himself; (see *Jarman v. Wooloton*, 3 Term 618, 622; *Ashworth v. Outram*, L. R., 5 Ch. Div. 923, 931; *Oglesby v. Hall*, 30 Ga. 386, 390; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Conklin v. Doul*, 67 Ill. 355, 357; *Fisk v. Cushman*, 6 Cush. 20, 29; *Cropsey v. McKinney*, 30 Barb. 47, 57; *Sammis v. McLaughlin*, 35 N. Y. 647, 650; *Penn v. Whitehead*, 17 Gratt. 503, 512; *Richardson v. Merrill*, 32 Vt. 27, 36; *Carey v. Burruss*, 20 W. Va. 571, 579; *Stimson v. White*, 20 Wis. 562, 563); and his heirs, voluntary assigns, etc., (*Richardson v. Merrill*, 32 Vt. 27, 36); but not against his creditors (*Uhrig v. Horstman*, 8 Bush 172, 176; *Cropsey v. McKinney*, 30 Barb. 47, 57; *McKinnon v. McDonald*, 4 Jones Eq. 1, 6), unless on valuable consideration: *Penn v. Whitehead*, 17 Gratt. 503, 512. When a wife thus trades under a settlement from or agreement with her husband, she takes in equity as with equitable separate property (*Penn v. Whitehead*, 17 Gratt. 503, 513); at law the business, profits, etc., are absolutely the husband's: *Stimson v. White*, 20 Wis. 562, 563. If the husband's consent to his wife's trading is by mere oral assent and without consideration, though he cannot ask back profits already made and collected by her (see *Green v. Pal-las*, 12 N. J. Eq. 267, 268; *Partridge v. Stocker*, 36 Vt. 108, 114), he can revoke his consent and claim the business as his own: *Conklin v. Doul*, 67 Ill. 355, 357; *Stimson v. White*, 20 Wis. 562, 563. If she carries on her business independently of her husband with equitable separate property, though by his consent, provided that he takes no part therein and gives the world no right to trust his credit: (see *Wortman v. Price*, 47 Ill. 22, 24; *Shackelford v. Collier*, 6 Bush 149, 159; *Alt v. Lafayette*, 9 Mo. App. 91; *Pawley v. Vogel*, 42 Mo. 291; *Lyman v. Place*, 26 N. J. Eq. 30; *National Bank v. Sprague*, 20 Id. 13, 25; *Quidort v. Pergeaux*, 18 Id. 472, 480; *Bucher v. Ream*, 68 Penn. St. 421, 426); or provided that all the credit is given to her (*Jenkins v. Flinn*, 37 Ind. 349, 352; *Tuttle v. Hoag*, 46 Mo. 38, 42, see *Harvey v. Norton*, 4 Jur. 42, 43; *Pearson v. Darrington*, 32 Ala. 227, 241, 242; *Taylor v. Shelton*, 30 Conn. 122, 127, 128; *Morris v. Root*, 65 Ga. 686, 688; *Connerat v. Goldsmith*, 6 Id. 14; *Meiners v. Munsen*, 53 Ind. 138, 142; *Weisker v. Lowenthal*, 31 Md. 413,

418; *Powers v. Russell*, 26 Mich. 179; *Hill v. Goodrich*, 46 N. H. 41; *Wilson v. Herbert*, 41 N. J. L. 454, 461; *Happek v. Hartby*, 7 Baxt. 411, 414; *Roberts v. Kelley*, 57 Vt. 97, 101), he is not liable; nor is she (*Tuttle v. Hoag*, 46 Mo. 38, 41; *Conklin v. Doul*, 67 Ill. 305, 308), though her equitable separate estate may be, if properly charged. But if she is merely doing business in her husband's place and stead with his consent, she is merely his agent and the business is his; he may claim the profits (*Switzer v. Valentine*, 4 Duer 96, 99; *Stimson v. White*, 20 Wis. 562, 563), the business is liable to his creditors (see *Patton v. Gates*, 67 Ill. 164, 167; *Wilson v. Loomis*, 55 Id. 352, 355; *Clinton v. Hummell*, 25 N. J. Eq. 45, 47), and he is liable for the debts of the business: *Barlow v. Bishop*, 1 East 432, 434; *Godfrey v. Brooks*, 5 Harr. (Del.) 396, 397; *Conklin v. Doul*, 67 Ill. 355, 357; *Jenkins v. Flinn*, 37 Ind. 349, 352; *Cropsey v. McKinney*, 30 Barb. 47, 57; *Barton v. Beer*, 35 Id. 78, 79; *Switzer v. Valentine*, 4 Duer 96, 99; *Swasey v. Antram*, 24 Ohio St. 87, 95; *Jacobs v. Featherstone*, 6 W. & S. 347, 349; *Partridge v. Stocker*, 36 Vt. 108, 114. Whether the business is really his or hers is a question of fact: *Jarman v. Wooloton*, 3 Term 618, 622; *Glover v. Alcott*, 11 Mich. 471, 479; *Abbey v. Deyo*, 44 N. Y. 343; *Partridge v. Stocker*, 36 Vt. 108, 113. What has been said under this section applies only where no statute has changed the common law as to married women's disabilities. Under the statutes, generally, the husband's consent is not necessary to enable a wife to trade, nor does his mere consent involve him in the liabilities of the business.

Sect. 6. *Capacity under Separate Property Acts*.—As a general rule, statutes which secure to married women the separate enjoyment of their *property*, do not change their *personal* status (see Md. Law Record, March 1, 1884)—a rule analogous to the rule in equity, that equity recognises married women's separate existence only in connection with their separate property. These acts do not by implication destroy the husband's common-law right to his wife's earnings (*Seitz v. Mitchell*, 94 U. S. 580, 584; *McLemore v. Pinkston*, 31 Ala. 267, 270; *Bear v. Hays*, 36 Ill. 280, 281; *Connor v. Berry*, 46 Id. 370, 372; *McMurtry v. Webster*, 48 Id. 123, 124; *Marshall v. Duke*, 51 Ind. 62; *Duncan v. Roselle*, 15 Iowa 501, 503; *Merrill v. Smith*, 37 Me. 394, 396; *Glover v. Alcott*, 11 Mich. 470, 482; *Apple v. Ganong*,

47 Miss. 197, 199; *Hoyt v. White*, 46 N. H. 45, 47; *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Rider v. Hulse*, 33 Barb. 264, 270; *Syme v. Riddle*, 88 N. C. 463, 465; *Raybold v. Raybold*, 20 Penn. St. 308, 311); but they do usually expressly or by implication secure to the wife the natural increase of her property (*Stout v. Perry*, 70 Ind. 501, 504; and since such increase is hers, though largely the result of her husband's efforts (*Aldridge v. Muirhead*, 101 U. S. 397, 399, there seems to be no reason why her own services to it, though these belonged to her husband, should injuriously affect her rights. See *Mitchell v. Sawyer*, 21 Iowa 582, 583. When a married woman has, as above suggested, no powers by statute unconnected with her statutory separate property, her dealings with such property in the way of trade must be subject to limitations of the same character as those which control her trading with her equitable separate estate: see *O'Daily v. Morris*, 31 Ind. 111, 112; *Todd v. Lee*, 16 Wis. 480, 483. She cannot, for example, trade under such a statute on her personal credit: *Glover v. Alcott*, 11 Mich. 470, 480, 485; *Robinson v. Wallace*, 39 Penn. St. 133. Her power to manage her separate estate and her power to trade are quite distinct: *Wheeler v. Raymond*, 130 Mass. 247, 248; *Nash v. Mitchell*, 71 N. Y. 199, 203. A contract for furniture to be used in a boarding-house which is her separate property (*Tillman v. Shackleton*, 15 Mich. 447, 454; *Chapman v. Briggs*, 11 Allen 547), or for horses for her livery stable (*Manderback v. Mock*, 29 Penn. St. 43, 47), may be invalid as contracts of a trader, but valid as contracts with relation to her separate property.

SECT. 7. *Capacity under other Statutes.*—A statute securing to a married woman her earnings or the products of her skill and industry, by implication enables her to earn money and to trade (see *Haight v. McVeagh*, 69 Ill. 624, 628; *Adams v. Honness*, 62 Barb. 326, 336; *Krouskop v. Shontz*, 51 Wis. 204, 215; *Dayton v. Walsh*, 47 Id. 113, 120; *Bovard v. Kettering*, 5 Out. 181), just as statutes securing to married women property acquired by purchase enable them to purchase on credit (*Tiemeyer v. Turnquist*, 85 N. Y. 516, 521; 39 Am. Rep. 674); thus alone are such statutes given a reasonable meaning. A statute enabling married women to trade, unless it contains restricting provisions (see *Bradstreet v. Baer*, 41 Md. 19, 23), enables them to trade just as if they were sole (*Bodine v. Kilteen*, 53 N. Y. 93, 96)—to use any of the usual means of trade (*Guttman v. Scannell*, 7 Cal. 458, 459), and to engage in any

legitimate calling: *Haight v. McVeagh*, 69 Ill. 624, 628. In some states the statutes require married women traders to secure a special license, or file among the records a special declaration, or obtain a decree of court, before they can engage in trade (see *Adams v. Knowlton*, 22 Cal. 283; *Reading v. Mullen*, 31 Id. 104, 106; *Martinez v. Ward*, 19 Fla. 176; *Franklin*, 79 Ky. 497, 498; *Moran v. Moran*, 12 Bush 303; *Uhrig v. Horstman*, 8 Id. 172, 177; *Wheeler v. Raymond*, 130 Mass. 247, 248; *Snow v. Sheldon*, 126 Id. 332, 334; *Youngworth v. Jewell*, 15 Nev. 45, 47; *King v. Thompson*, 87 Penn. St. 365, 368; *Elsev v. McDaniel*, 95 Id. 472, 474; *Orrell v. Van Gorder*, 96 Id. 180, 181); but it seems that she cannot plead her failure to conform with such requirements, as they are simply for the benefit of the husband's creditors: *Porter v. Gamba*, 43 Cal. 105, 109. See *Youngworth v. Jewell*, 15 Nev. 45, 47. Since her personal incapacity to contract is the main cause of a married woman's inability to trade at common law, all statutes enabling her to contract indirectly enable her to trade.

II.—THE INCIDENTS OF MARRIED WOMEN'S CAPACITY TO TRADE.

Sect. 8. *Status, Rights and Liabilities of Married Women Traders, Generally.*—The status, rights and liabilities of married women traders, have been already to some extent discussed, and the importance, in this connection, of considering the source of a particular trader's capacity in any particular case must be apparent. Generally speaking, when a married woman can trade only by virtue of her ownership of equitable or statutory separate estate, she cannot trade on her personal credit or act as a *feme sole* (*O'Daily v. Morris*, 31 Ind. 111, 112; *Glover v. Alcott*, 11 Mich. 470, 485; *Robinson v. Wallace*, 39 Penn. St. 133; but can only deal with the property so that the profits will enure to her own benefit (*Mitchell v. Sawyer*, 21 Iowa 582, 583; *Carey v. Burruss*, 20 W. Va. 571, 579; and can only render it liable for her debts by charging it—contracting with reference to it, etc.—her contracts being valid against it, not because she is a trader, but because they are such as may be enforced in equity or under the property acts. See *Tillman v. Shackleton*, 15 Mich. 447; *Chapman v. Briggs*, 11 Allen 547; *Manderbach v. Mock*, 29 Penn. St. 43, 47; *Todd v. Lee*, 16 Wis. 480, 483. So, when she trades simply as her husband's agent, though she binds him she does not bind herself personally: (see *Conklin v. Doul*, 67 Ill. 355, 357;

Tuttle v. Hoag, 46 Mo. 38, 41; she may have the profits if he chooses to let her keep them (see *Penn v. Whitehead*, 17 Gratt. 503, 512; but he and the business are liable for the debts contracted by her on its behalf: *Partridge v. Stocker*, 36 Vt. 108, 114. When, however, she may trade personally, by virtue of her husband's abandonment, etc., by custom or by statute, she can trade just as if unmarried: (*Abbey v. Deyo*, 44 Barb. 374, 381; unless, of course, the statute limits her capacity: *Young v. Gori*, 13 Abb. Pr. 13, 14. In such case, as will now be shown, she, for the purposes connected with her business, has the status of a *feme sole*, the fullest rights to the enjoyment of the profits of the business, and the fullest liabilities for its debts.

Sect. 9. *Express Powers of Married Women Traders*.—Most of the statutes as to married women traders expressly provide that they shall trade "as if *sole*," and under such statutes no special questions seem to have arisen. See *Berry v. Zeiss*, 32 U. C., C. P. 231, 239; *Porter v. Gamba*, 43 Cal. 105, 109; *Martinez v. Ward*, 19 Fla. 175, 187, 188; *Kingman v. Frank*, 38 Hun 471; *Williams v. Lord*, 75 Va. 390, 398, 399; *Krouskop v. Shontz*, 51 Wis. 204, 217; the main questions are as to the implied powers of married women traders, and are discussed below. In one case the naming of certain powers was held a denial of all other powers: *Bradstreet v. Baer*, 41 Md. 19, 23; *Cruzen v. McKaig*, 57 Id. 404, 462.

Sect. 10. *Implied Powers of Married Women Traders*.—Under statutes enabling a married woman to trade and not limiting her capacities, she may trade precisely as if unmarried; she is, as to her business, a *feme sole*, and may do all things incidental to trading in general, and all things usual and proper in the particular trade in which she is engaged: *Young v. Gori*, 13 Abb. Pr. 13, 14 note. See *Berry v. Zeiss*, 32 U. C., C. P. 231, 239; *Trieber v. Stover*, 30 Ark. 727, 730; *Camden v. Mullen*, 29 Cal. 564, 566; *Porter v. Gamba*, 43 Id. 105, 109; *Rockwell v. Clark*, 44 Conn. 534, 536; *Martinez v. Ward*, 19 Fla. 175, 187; *Nispel v. Laparle*, 74 Ill. 306, 308; *Wallace v. Rowley*, 91 Ind. 586, 589; *Tallman v. Jones*, 13 Kans. 438, 445; *Mitchell v. Sawyer*, 21 Iowa 582, 583; *Snow v. Sheldon*, 126 Mass. 332, 334; *Knowles v. Hull*, 99 Id. 562, 564; *Rankin v. West*, 25 Mich. 195, 201; *Allen v. Johnson*, 48 Miss. 413, 418; *Netterville v. Barber*, 52 Id. 168, 172; *Youngworth v. Jewell*, 15 Nev. 45, 47; *Wheaton*

v. Phillips, 12 N. J. Eq. 221, 223; *Barton v. Beer*, 35 Barb. 78, 80; *James v. Taylor*, 43 Id. 530, 531; *Abbey v. Deyo*, 44 Id. 397, 301; *Adams v. Honness*, 62 Id. 326, 336; *Wood v. Sanchey*, 3 Daly 197, 198; *Nash v. Mitchell*, 71 N. Y. 200, 203; *Frecking v. Rolland*, 53 Id. 422, 425; *Bodine v. Killeen*, Id. 93, 96; *Baum v. Mullen*, 47 Id. 577, 579; *Sammis v. McLaughlin*, 35 Id. 647, 650; *Kingman v. Frank*, 33 Hun 471; *Morgan v. Perhamus*, 36 Ohio St. 517; *Silveus v. Porter*, 74 Penn. St. 448, 451; *Wilthaus v. Ludecus*, 5 Rich. 326, 329; *Newbiggin v. Pillans*, 2 Bay 162, 165; *Williams v. Lord*, 75 Va. 390, 398; *Krouskop v. Shontz*, 51 Wis. 214, 217; *Dayton v. Walsh*, 47 Id. 113, 120. The object of these statutes is not only to do justice to wives (*Youngworth v. Jewell*, 15 Nev. 45, 47), but also to encourage trade. See *McDaniel v. Cornwall*, 1 Hill (S. C.) 428, 429.

To illustrate: She may engage in any legitimate calling: *Guttman v. Scannell*, 7 Cal. 455, 459. She may conduct her business personally or by agent; she may have her manager (*Cooper v. Ham*, 49 Ind. 393, 416), her salesmen and clerks (*Guttman v. Scannell*, 7 Cal. 455, 459; *Abbey v. Deyo*, 44 Barb. 374, 381); she may be a partner, silent or active (*Parshall v. Fisher*, 43 Mich. 529, 534), as will be shown; and she may, unless this is prohibited by statute (see *Porter v. Gamba*, 43 Cal. 105, 109), have her husband as her agent (*Guttman v. Scannell*, 7 Cal. 455, 459; *Bellows v. Rosenthal*, 31 Ind. 116; *Rankin v. West*, 25 Mich. 195, 200; *Lockwood v. Cullin*, 4 Robt. 129, 136; though, as will be shown, whether she may be a partner with him is disputed. She need not unless the statute so provides (*Ex parte Franklin*, 79 Ky. 497, 498), have separate property to begin with (*Tallman v. Jones*, 13 Kans. 438, 445; *Dayton v. Walsh*, 47 Wis. 113, 120); she may start out on credit (*Young v. Gori*, 13 Abb. Pr. 13, 14, note), or use property given her by her husband (*Lockwood v. Cullin*, 4 Robt. 129, 136), though, in the latter case, his creditors may have rights. See *Penn v. Whitehead*, 12 Gratt. 74. The capital and stock in trade (*Lovell v. Newton*, L. R., 4 C. P. Div. 7, 12; *James v. Taylor*, 43 Barb. 530, 531,) of her business, as well as the profits (*Mitchell v. Sawyer*, 21 Iowa 582, 583; *Sammis v. McLaughlin*, 35 N. Y. 647, 650; *Silveus v. Porter*, 74 Penn. St. 448, 457; *Meyers v. Rahte*, 46 Wis. 655, 659; *Dayton v. Walsh*, 47 Id. 113, 110) are hers; and such property, though in the joint possession of herself and her husband, is in her

possession—the possession following the title: *Newbrick v. Dugan*, 61 Ala. 251, 253; 23 Am. Law Reg. (N. S.) 627. She may, on credit, purchase goods for her trade (*Nispel v. Laparle*, 74 Ill. 306, 308; *Frecking v. Rolland*, 53 N. Y. 422, 425), or buy land or seed for farming purposes (*Camden v. Mullen*, 29 Cal. 564, 566; *Chapman v. Foster*, 6 Allen 136, 138); or rent a store (*Knowles v. Hull*, 99 Mass. 562, 564); or contract for her services (*Adams v. Honness*, 62 Barb. 326, 336); or contract for working a quarry—for the laborers and mules (*Netterville v. Barber*, 52 Miss. 168, 172); she may, as if sole, transfer a note received by her in the course of trade (*Rockwell v. Clark*, 44 Conn. 534, 536); and she may even sell out her business, and agree not to use the same name again: *Morgan v. Perhamus*, 36 Ohio St. 517. She is personally liable on all contracts made by her in the course of her business (*Barton v. Beer*, 35 Barb. 78, 80. See *Trieber v. Stover*, 30 Ark. 727, 730; *Nispel v. Laparle*, 74 Ill. 306, 308), even as endorser of a note (*Wilthaus v. Ludecus*, 5 Rich. 326, 327); she is liable for the frauds, etc., of her employees (*Baum v. Mullen*, 47 N. Y. 577, 579), and is estopped, as if sole, from denying their right to represent her (*Bodine v. Killeen*, 53 N. Y. 93, 96); so, she is liable, as if sole, for goods consigned to her (*Newbeggin v. Pillans*, 2 Bay 162, 165); she may make a deed for the benefit of creditors (*Schumann v. Peddicord*, 50 Md. 560), and take the benefit of the insolvent or bankrupt laws. See *Ex parte Holland*, L. R., 9 Ch. Div. 307, 311; *In re Kinkead*, 3 Biss. 405, 410. But see, *Relief v. Schmidt*, 55 Md. 97. Whether she is in business is a question of fact (see *Jarman v. Woolton*, 3 Term 618, 622; *Glover v. Alcott*, 11 Mich. 471, 479; *Abbey v. Deyo*, 44 N. Y. 343; *Partridge v. Stocker*, 36 Vt. 108, 113), though, if preliminaries are required, as the filing of a declaration, whether the requirements have been fulfilled is, of course, in part a question of law. So, whether a particular transaction was in the course of her business is a question of fact: *Camden v. Mullen*, 29 Cal. 564, 567. When she sues she must allege and prove that she was engaged in business, and that the right of action arose in the course thereof (*Smith v. New England*, 45 Conn. 415, 420), and when she is sued these facts must be alleged and proved by the plaintiff: *Baum v. Mullen*, 47 N. Y. 577, 579; *Wood v. Sanchey*, 3 Daly 197, 198; *Nash v. Mitchell*, 11 N. Y. 200, 203.

Sect. 11. *Married Women Traders as Partners*.—It has been said that a married woman trading in equity with her equitable separate property, may enter into partnership (*Penn v. Whitehead*, 17 Gratt. 503, 512); but this statement must be taken with limitations. For the normal contract of partnership is a personal contract involving a personal capacity (*Carey v. Burruss*, 20 W. Va. 571, 576; 43 Am. Rep. 790), which a married woman does not have in equity or under mere separate property acts. Accordingly, it is settled that statutes securing to married women their property with the rents, profits, increase, etc., do not enable them to enter into partnership: *Bradstreet v. Baer*, 41 Md. 19, 23; *Mayer v. Soyster*, 30 Id. 403; *Howard v. Stephens*, 52 Miss. 239, 244; *Bradford v. Johnson*, 44 Tex. 381, 383; *Carey v. Burruss*, 20 W. Va. 571, 576; 43 Am. Rep. 790. At common law, when a female partner married the partnership was dissolved (*Bassett v. Shepardson*, 52 Mich. 3; *Alexander v. Morgan*, 31 Ohio St. 546, 550); and now she cannot be a partner if she has no capacity to trade personally (see *Swasey v. Antram*, 24 Ohio St. 87, 95; *Carey v. Burruss*, 20 W. Va. 574, 575; 43 Am. Rep. 790), or if she is expressly prohibited by the statute enabling her to trade (see *Todd v. Clapp*, 118 Mass. 495, 496), or so far as she is thereby partially prohibited (see *Porter v. Gamba*, 43 Cal. 105, 109), as she is in some states. But as she has, under statutes giving her the capacity to trade generally, the personal capacity to trade as if sole and the power to pursue all the usual methods of trade, by the weight of authority, she may under such acts, trade in partnership (*Kinkead*, 3 Biss. 405, 410; *Camden v. Mullen*, 29 Cal. 564, 565; *Francis v. Dickel*, 68 Ga. 255, 258; *Preusser v. Henshaw*, 49 Iowa 41, 44; *Westphal v. Henney*, 49 Id. 542, 543; *Plumer v. Lord*, 5 Allen 460, 462; *Parshall v. Fisher*, 43 Mich. 529, 532, 534; *Newman v. Morris*, 52 Miss. 402, 406; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; 8 Daly 311; *Bitter v. Rathman*, 61 N. Y. 512, 513; *Scott v. Conway*, 58 Id. 619; *Graff v. Kennedy*, 31 Alb. L. J. 2; *Silveus v. Porter*, 74 Penn. St. 448, 449; *Krouskop v. Shontz*, 51 Wis. 204, 217; *Horneffer v. Duress*, 13 Id. 603, 605)—she may even be a secret partner: see *Parshall v. Fisher*, 43 Mich. 529, 534; *Scott v. Conway*, 58 N. Y. 619; *Bitter v. Rathman*, 61 Id. 512, 513. Still in a few cases and on different grounds this capacity to be a partner has been denied: *Haas v. Shaw*, 91 Ind. 384, 389, 396; *Montgomery v. Sprankle*, 31 Id. 113, 115; *Maghee v. Baker*,

15 Id. 254, 257; *Bradstreet v. Baer*, 41 Md. 19, 23; *Cruzen v. McKaig*, 57 Id. 454, 462; *Carey v. Burruss*, 20 W. Va. 571, 576; 43 Am. Rep. 790. So also as she is a *feme sole* in her trade, and may therein employ general or special agents, and may employ her husband as such there seems to be no reason why she should not be able, when she can be partner at all, to be the partner of her husband, and accordingly many cases hold (*In re Kinkead*, 3 Biss. 405, 410; *Francis v. Dickel*, 68 Ga. 255, 258; *Newman v. Morris*, 52 Miss. 402, 406; *Zimmerman v. Erhard*, 58 How. Pr. 11, 13; *Graff v. Kennedy*, 31 Alb. L. J. 2), while others assume (see *Camden v. Mullen*, 29 Cal. 554, 565; *Westphal v. Henney*, 69 Iowa 542, 543; *Parshall v. Fisher*, 43 Mich. 529, 532, 534; *Silveus v. Porter*, 74 Penn. St. 448, 449; *Krouskop v. Shontz*, 51 Wis. 204, 217; *Horneffer v. Duress*, 13 Id. 603, 604), that she can. But this has been strenuously denied, on the ground that even where a married woman may contract, she cannot, at law, without express authority, contract with her husband, and that the particular statute enables her to trade on her "separate" account: *Lord v. Parker*, 3 Allen 127, 129; *Edwards v. Stevens*, Id. 315; *Plumer v. Lord*, 5 Id. 460, 462; *Allen v. Johnson*, 48 Miss. 413, 419. See *Haas v. Shaw*, 91 Ind. 384, 389. To this it may be replied that if a wife may employ her husband as her agent, as all admit she can, it is not consistent to say that she cannot contract with him at all, and that the word "separate," in the statutes, refers to the wife's status; not to the manner in which she shall trade: *Zimmerman v. Erhard*, 58 How. Pr. 11, 13, 14.

In such cases as she cannot be a partner, and therefore could not be held liable as partner on a note not signed by her (*Carey v. Burruss*, 20 W. Va. 571, 582; 43 Am. Rep. 790; *Plumer v. Lord*, 7 Allen 481, 485), she may, nevertheless, be liable for her individual acts: *Cruzen v. McKaig*, 57 Md. 454, 462; and she does not in such cases lose her property put into the firm business: *Maghee v. Baker*, 15 Ind. 254, 257. So, even when she cannot join a firm of which her husband is a member (*Plumer v. Lord*, 7 Allen 481, 484), she may, after his retirement, go in, and on a new consideration become liable for pre-existing partnership debts: see *Preusser v. Henshaw*, 49 Iowa 41, 44. So, though she cannot be a partner, she may jointly lease and share the profits of joint property (*Allen v. Johnson*, 48 Miss. 413, 419), and be bound by her husband's acts as her agent with respect thereto: *Reiman v. Ham-*

ilton, 111 Mass. 245, 247. In a few cases, without speaking of husband and wife as partners, equity has decreed an apportionment of the profits of a business carried on by them jointly : see *Glidden v. Taylor*, 16 Ohio St. 509, 522 ; *Penn v. Whitehead*, 17 Gratt. 503, 513.

Sect. 12. *Married Women as Corporators, Stockholders, &c.*—Very nearly the same questions arise in considering a married woman's capacity to be an incorporator as those which are involved in her right to be a partner : *Plummer v. Lord*, 5 Allen 460, 462. Corporators enter into a mutual and personal contract, which is concluded by the act of incorporation (*Taylor, Corporations*, sect. 31); and therefore without personal capacity to contract a married woman could not be an incorporator. But, as business is very commonly carried on by corporations, a married woman with a general capacity to trade would, it seems, have by implication the capacity to be an incorporator. The fact that the corporation laws provide that "any person" may be an incorporator, would not give such capacity to a married woman under disabilities, for such general laws apply only to persons *sui juris* : see rule discussed, *Md. Law Record*, March 1st 1884. But a married woman may be a stockholder, holding her stock as any other *chose in action* ; and it has been held that when her *choses in action* are her separate property she is liable as any other stockholder for assessments, &c. : *Anderson v. Line*, 14 Fed. Rep. 405, 406 ; *The Reciprocity Bank*, 22 N. Y. 9, 15.

It is of course difficult to state with certainty the law on so complicated a subject as that discussed in this article, and many of the points touched upon would bear much elaboration ; but we have endeavored simply to collect the cases relating to the trade of married women and to give in a few words the law as it appears therein.

DAVID STEWART.

Baltimore.

RECENT ENGLISH DECISIONS.

Court of Appeal.

BRUNSDEN v. HUMPHREY.

Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods, is no bar to an action subsequently commenced for the injury to the person.

So held by BRETT, M. R., and BOWEN, L. J., Lord COLERIDGE, C. J., dissenting.

The plaintiff brought an action in a county court for damage to his cab, occasioned by the negligence of the defendant's servant, and having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence. Held, by BRETT, M. R., and BOWEN, L. J., Lord COLERIDGE, C. J., dissenting, that the action in the high court was maintainable, and was not barred by the previous proceedings in the county court.

Judgment of the Queen's Bench Division (L. R., 11 Q. B. Div. 712,) reversed.

APPEAL of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant. The plaintiff, whilst he was driving his cab, came into collision with a van of the defendant through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged. The plaintiff, before the present action, sued the defendant for damage to his cab in a county court, and the defendant paid into court a small sum which was accepted, and thereupon the action in the county court was discontinued. Upon these facts the Queen's Bench Division entered judgment for the defendant: (L. R., 11 Q. B. Div. 712).

Waldy, Q. C., and *Orispe*, for plaintiff.

Murphy, Q. C., and *J. C. Hannen*, for defendant.

BRETT, M. R.—This case was heard before POLLOCK, B., and LOPES, J. The plaintiff was a cabman driving in his vehicle when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for 350*l.*, showing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the

county court for damage to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side it was contended that there were two distinct causes of action, and that there was no law to prevent two actions; that it might be sometimes oppressive to bring two actions, but that in that event the court might summarily stay one of them, and that in the present case the two actions were not oppressive. The question is whether there are two causes of action, or whether there is only one; and if there is but one cause of action the present suit is not maintainable. For the defendant, reliance has, in effect, been placed upon the maxim, *interest reipublicæ ut sit finis litium*: and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried; in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application. But, in order to apply it, we must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured. The question, however, remains whether the cause of action is the same. In this case the injury was occasioned by the negligent driving of the defendant's servant. Suppose that by the negligent driving of the defendant's servant the van had run against the plaintiff's cab, and had injured him without doing any damage to the cab, an action would have lain, and any apparent bodily injury which the plaintiff might have sustained would be a cause of action. Suppose that the defendant's servant, by his negligent driving, had damaged the plaintiff's cab without injuring him personally; under circumstances of that kind the cause of action would be a damage to the plaintiff's property. The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action:

the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods; therefore the plaintiff is at liberty to maintain the present action. Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of 350*l.* awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action.

BOWEN, L. J.—The plaintiff in this case has recovered a verdict and 350*l.* damages for personal injuries sustained by him through the negligence of the defendant's servant in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box, and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the county court for damages done to his cab in the collision, and the particulars delivered under his plaint had been confined to the damages which the cab had sustained. The defendant in the county court action paid 4*l.* 3*s.* into court together with 6*s.* costs, upon which the plaintiff had discontinued the county court plaint. The present action was now brought in the High Court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant at the time of the county court proceedings. On a motion for a new trial the court below have entered a judgment for the defendant on the ground that the recovery of damages in respect of the cab in the county court is a bar to any further action for injury

to the plaintiff's person. The rule of the ancient common law is that where one is barred in any action, real or personal, by judgment, demurrer, confession or verdict, he is barred as to that or the like action, of the like nature, for the same thing forever. "It has been well said," says Lord COKE in a note to *Ferrer's Case*, 6 Coke 9 a., "*interest reipublicæ ut sit finis litium*, otherwise," says Lord COKE, "a great oppression might be done under color and pretence of law:" see, also, *Sparry's Case*, 5 Coke 61 a; *Higgins's Case*, 6 Id. 45 a; Year Book 12 Edward IV., p. 10 13,. Accordingly in *Hudson v. Lee*, 4 Coke 43 a, it was held to be a good plea in bar to an appeal of mayhem, that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird v. Randall*, 3 Burr. 1345, it was decided to be an answer to an action for seducing a man's servant from his service, that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips v. Berryman*, 3 Doug. 287, a recovery in replevin was held to be good bar to an action on the statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb, *Nemo debet bis vexari pro eadem causa*. It is a well settled rule of law, that damages resulting from one and the same cause of action, must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. "The principal consideration," says DEGREY, C. J., in *Hitchen v. Campbell*, 2 W. Bl. 827, is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case." "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions." See per Lord ELDON, in *Martin v. Kennedy*, 2 B. & P. 71. "The question," says GROSE, J., in *Sedden v. Tutop*, 6 T. R. 607, "is not whether the sum demanded *might have been*, recovered in the former action, the only inquiry is whether the same cause of action *has been* litigated and *considered* in the former action." Accordingly, "though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made

to give evidence upon some of the claims, they might be recovered in another action :” *Thorpe v. Cooper*, 5 Bing. 129. It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

I have now to consider the application of the above doctrine to the case of the present action ; and the question to be decided is whether the damage done by the negligent driving of the defendant’s servant to the plaintiff’s cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff’s person. Nobody can doubt that if the plaintiff had recovered any damages for injuries to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently. See *Fetter v. Beal*, 1 Ld. Raym. 839. “The jury,” says the court in that case, “have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff.” This authority, however, leaves still open the point I now have to determine, whether the cause of the action arising from damage to the plaintiff’s cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question, let me assume, for the sake of argument, that the damage had been caused by some act of the defendant himself, and not merely an act of his servant. According to the old distinctions of forms of actions which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury ; trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and Roman law. Every one in this country has an absolute right to security for his person. Everybody has further an absolute right to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject-matter of each grievance was the same ? Applying the test of identity furnished by DE GREY, C. J., in *Hitchen v. Campbell*, 2 W. Bl.

827, the first matter that is obvious is that the same evidence would not have supported an action for trespass to the person and an action for the trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do, with the damage done to the goods and chattels. In the other case the plaintiff's title to the goods might have been in issue in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And finally, the damage in one case might have been directly due to the wrongful act complained of; in the other case it might not. There is no authority, so far as I know, in the books, for the proposition that a recovery in an action for a trespass to the person would be a bar to the maintenance of an action for a trespass to goods, committed at the same time. In the present instance, as the defendant himself was not driving, but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which, in the eye of the law, the master or employer is responsible. Now, what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or movable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which, in such an instance, will, as a rule, involve, and have been accompanied by specific damage. Without reverting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms "*injuria*" and "*damnum*," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain

class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says PARKE, B., in *Embrey v. Owen*, 6 Ex. 353, at 368, "is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not, as a rule, applicable to actions for negligence which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says LITLEDALE, J., in *Williams v. Morland*, 2 B. & C. 916, "there must be temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case." See *Fay v. Prentice*, 1 C. B. 835, per MAULE, J.

This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only, or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the court below and from the great authority of the present chief justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which if no damage had ensued would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord CAMPBELL'S Act by the widow and children of a person who

has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once, and not to split their demands; but there is no positive law (except so far as the county court acts have from a very early date dealt with the matter) against splitting demands which are essentially separable (see *Seddon v. Tutop*, 6 T. R. 607), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. In the present case the plaintiff's particulars in the county court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the county court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second: see *Seddon v. Tutop*, 6 T. R. 607. With all respect, I do not see how it can be said that *Nelson v. Couch*, 15 C. B. N. S. 99, so decides. That case established only the converse rule, viz., that the maxim, "*nemo debet bis vexari*," cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of COLERIDGE, J., and the other members of the court, *Hodsoll v. Stallebrass*, 11 A. & E. 305, must, I think, be read by the light of the special circumstances of that case; and so read, is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority, in holding, as I do in the present instance, that the damage, for which the plaintiff is now suing, accrues from a different injury, and, therefore, a different wrong from that for which he recovered damages in the county court. The view at which I have arrived, is in conformity with the reasoning of the judgment recently pronounced by this court in the case of *Mitchell v. Darley Main Colliery Co.*, L. R., 14 Q. B. Div. 125, where it was held, reversing *Lamb v. Walker*, 3 Q. B. D. 389, that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law, that none shall be vexed twice for the same cause of action, to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths, which would involve practical injustice. The present case

is one in which I am conscious that lawyers of great authority do differ, and will differ. But on the whole, in my opinion, the judgment of the Queen's Bench Division ought to be reversed, and the judgment entered at the trial for the plaintiff be restored with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C. J.—In this case, I am, with much regret, unable to concur in the judgment of my Brother BOWEN, to which I understand the Master of the Rolls to assent. I should have been glad in the face of this difference of opinion to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment, by one and the same act in respect of different *rights*, *i. e.* his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve, which contain his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think that the court below was right, and that this appeal should be dismissed.

That the same act—the same tort—may cause two injuries, and subject the party to two different suits, is, of course, legally possible. The most obvious instance is where two different persons are injured in their person or individual property by one and the same act of the defendant. There, clearly enough, the wrongdoer is liable to a suit by each; and if one steals the property of A., and other property of B. at the same time, he is liable to two indictments and two punishments; for really it is two larcenies, although only one act of taking: *Commonwealth v. Sullivan*, 104 Mass. 552; *Commonwealth v. Andrews*, 2 Id. 409; *State v. Thurston*, 2 McMullan Vol. XXXIII.—48

382; *United States v. Beerman*, 5 Cranch C. C. 412, a valuable case on the point.

But where only one person is injured by one isolated and single act, not continued or repeated, whether that injury be to two portions of his person, as his leg and his arm, or to his person and also to his property, or only to two different articles of his personal property, it is not easy to see, upon the well-established principles, how there are two *causes* of action, or why there should be, or need be, two different suits to recover the whole amount of damage sustained.

That in the last instance given above,

viz., of injury by the same act to two different articles belonging to the same person, only one action can be brought, seems entirely well settled: even though through ignorance or inadvertence the injury to the second chattel was not known to the plaintiff when the first suit was brought: *Folsom v. Clemence*, 119 Mass. 473; *Marble v. Keyes*, 9 Gray 221; *Bennett v. Hood*, 1 Allen 47; *Trask v. Hartford & New Haven Railroad Co.*, 2 Id. 331; *Herriter v. Porter*, 23 Cal. 385; *Braunenburgh v. Indianapolis Railroad Co.*, 13 Ind. 103; *Cumming v. Haines*, 5 Cal. 81.

If a man wrongly converts a thousand barrels of flour at one time, it would be monstrous to allow the owner to bring a thousand suits therefor: *Farrington v. Paine*, 15 Johns. 432. And see *O'Neal v. Brown*, 21 Ala. 482; *Hite v. Long*, 6 Rand. 457, and other cases.

And this is so even though the owner was prevented from including, in the first suit, all the articles taken or injured, by the fraudulent conduct of the defendant in refusing to allow him to examine the articles taken away in order to ascertain their number, or the amount of injury to each. The plaintiff in such case has only one "cause of action;" and the defendant does not attempt to conceal the cause of action, but only the extent and amount of the damage sustained by a well-known and understood cause. See *McCafferty v. Carter*, 125 Mass. 330.

And for a similar reason if A. steals

several articles from B. at one and the same time, he cannot be twice convicted and punished on two indictments, one for each article stolen. See Whart. Cr. Pl. & Pr., sect. 470; Whart. Cr. Ev., sect. 588, and cases cited in notes.

So, in the other instance above given, of injury to two parts of one's person, his leg and his arm, by one and the same blow, or by successive blows at one and the same assault, it is equally clear that but one action could be sustained, although the extent of the injury might not have been known when the first suit was brought: *Fetter v. Beale*, 1 Salk. 11; *Whitney v. Clarendon*, 18 Vt. 252; *Howell v. Goodrich*, 69 Ill. 556; *Read v. Great Western Railway Co.*, L. R., 3 Q. B. 555.

Why then, in case of injury to one's person and property by one and the same transaction, at one and the same time, as in the principal case, should a person be allowed two suits? Is there more than one cause of action in such case any more than in the others, where two actions are not allowed? It certainly seems that the reasoning of COLERIDGE, C. J., in the principal case, is more in harmony with the established rules of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below, 11 Q. B. 712, were on the same side, so that really the majority of those judges who have expressed opinions on the subject are against successive actions in such cases.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Arkansas.

SWANN v. SWANN.

Contracts made on the Lord's day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute, and in the making of which

the parties to it incurred the prescribed penalty. A penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue.

When, by the laws of a state, a large class of its citizens may lawfully labor and make contracts on the Lord's day, it is not, in a legal sense, against the public policy of such state, nor shocking to the moral sense of its people, for its courts to enforce a contract made on that day in another state, and valid by the law of that state.

A contract made on the Lord's day, and valid by the law of the state where made, will be enforced by the courts of another state, by the laws of which such contract would be void.

The only authentic and admissible evidence of the public policy of a state, on any given subject, are its constitution, laws and judicial decisions.

AT law.

Ratcliff & Fletcher, for plaintiff.

Clark & Williams, for defendant.

CALDWELL, J.—This suit is founded on a promissory note of which the defendant is the maker and the plaintiff the payee. The defence is that the note was executed on the Lord's day. The proof shows the note was executed on that day in the state of Tennessee, where the parties to it then resided, for the consideration of a valid pre-existing debt due from the defendant to the plaintiff. There is no place of payment fixed in the note.

In *Tucker v. West*, 29 Ark. 386, a note executed in this state on the Lord's day was held to be void under the statute. This court takes judicial notice of the laws of the several states: *Owings v. Hull*, 9 Pet. 607; *Railroad Co. v. Bank of Ashland*, 12 Wall. 226.

By the law of Tennessee, where the note was executed, it is a valid obligation. In *Amis v. Kyle*, 2 Yerg. 31, the Supreme Court held that the statute of that state only prohibited labor and business in the "ordinary calling" of the parties; and that isolated private contracts, made by parties outside of their ordinary calling, are not invalidated. This rule was carried to a great length in the case cited. An obligation, to be discharged in horses, was made payable on the Lord's day, and the court held the contract valid, and that a tender of the horses, to have the effect of discharging the obligation, must be made on that day. This was held upon the ground that the sale and delivery of horses was not the ordinary calling of either of the parties. The attention of the court has not been

called to any later exposition of the law of that state than is contained in this decision, and it will be assumed that there is none.

Under the rule established in *Amis v. Kyle*, it is obvious the note, which is the foundation of this suit, was valid in Tennessee. The execution of a note for a pre-existing debt was probably not the ordinary calling of either of the parties. If it was, the burden of proof was on the defendant to show it: *Roy v. Johnson*, 7 Gray 162; *Bloxsome v. Williams*, 3 B. & C. 232. The doctrine of the Supreme Court of Tennessee is the doctrine of the early English cases under the statute of 29 Chas. II. c. 7, which prohibited labor only in the "ordinary calling of the parties: *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, *supra*; *Rex v. Whitnash*, 7 B. & C. 596; *Fennell v. Ridler*, 5 Id. 406; *Rex v. Brotherton*, 2 Strange 702. It is also the doctrine of some of the American cases: *Hellams v. Abercrombie*, 15 S. C. 110; *Bloom v. Richards*, 2 Ohio St. 387; *George v. George*, 47 N. H. 27; *Hazard v. Day*, 14 Allen 487. Of course, the law of this state has no extra-territorial operation, and cannot affect the validity of contracts executed elsewhere on the Lord's day. And the general rule is that a contract valid by the law of the place where it is made is valid everywhere, and will be enforced by the courts of every other country. But there are exceptions to this general rule, and among them contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the state, will not be enforced, although they may be valid by the law of the place where they are made: Story on Conf. of Laws, § 244; Westl. Int. Law, § 196; Whart. Conf. Laws, § 490.

The contention of the learned counsel for the defendant is that a court of this state ought not to enforce a contract made on the Lord's day in another state, though valid by the law of that state, because the contract is the result of an immoral and irreligious act, and its enforcement here would shock the moral sense of the community and violate the public policy of the state. Assuming, but not deciding, that the determination of this question must be the same in this court that it would be in a court of the state, we will proceed to inquire whether there is any principle upon which a court of the state could refuse to enforce the contract in suit.

The common law made no distinction between the Lord's day and any other day. Contracts entered into on that day were as valid as those made on any other day. The contract in suit was volun-

tarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a state. The term, as it is often popularly used and defined, makes it an unknown and variable quantity, much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources.

In *Vidal v. Girard's Ex'rs*, 2 How. 127, 198, it was objected by Mr. Webster that the foundation of the Girard College, upon the principles prescribed by the testator, was "derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania." In replying to this argument the court said: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us." * * *

What is there, then, in the constitution, laws and decisions of this state evincing a public policy hostile to the enforcement of contracts lawfully made in other states on the Lord's day? The constitution of the state declares: "No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other. * * * No religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief:" Const. 1874, §§ 24, 26.

So much of the statute of the state as has any bearing on this

question reads as follows: "Sect. 1614. Every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or perform other services than customary household duties of daily necessity, comfort or charity, on conviction thereof shall be fined one dollar for each separate offence."

* * * "Sect. 1617. Persons who are members of any religious society, who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalties of this act, so that they observe one day in seven, agreeably to the faith and practice of their church or society."

It is obvious the statute does not attempt to compel the observance of the first day of the week, as a day of rest, as a religious duty. It would be a nullity if it did so.

"In *Bloom v. Richards*, 2 Ohio St. 387, the court, THURMAN, J., delivering the opinion, said: "Thus the statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this state, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty."

And see, to the same effect, *Specht v. Commonwealth*, 8 Barr 312; *City Council of Charleston v. Benjamin*, 2 Strob. 508.

In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions there can be no mingling of the affairs of church and state by legislative authority. All religions are tolerated and none is established. Each has an equal right to the protection of the law, whether Christians, Jews or infidels: *Andrew v. Bible Society*, 4 Sandf. (N. Y.) 182; *Ayres v. Methodist Church*, 3 Id. 377; *Cooley Const. Lim.* 472. No citizen can be required by law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The old idea that religious faith and practice can be, and should be, propagated by physical force and penal statutes has no place in the American doctrine of government. Force can only effect external observances; whereas, religion consists in a temper of heart and conscious faith which force can neither implant nor efface. History records the mischievous consequences of all efforts to propagate religion, or alter man's relations to his Maker, by penal statutes. In religion no man is his neighbor's keeper, and no more is the state the keeper of the religious conscience of the people. The state protects all religions, but espouses none. Every man is

individually answerable to his God for his faith and his works, and must therefore be left free to imbibe and practice any faith he chooses, so long as he does not interfere with the rights of his neighbor. The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation: *Slaughter-house Cases*, 16 Wall. 36, 62, and cases cited; *Bloom v. Richards*, *supra*; *Specht v. Commonwealth*, *supra*; *City of Charleston v. Benjamin*, *supra*.

Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation. Neither man nor beast can stand the strain of constant and unremitting toil. Such a day, when designated by the state, is a civil and not a religious institution. No merely religious duty is enjoined. The statute does not require attendance on church, any more than it requires attendance to hear a lecture in support of infidelity. In point of lawfulness, there is no difference between an orthodox sermon and such a lecture on the Lord's day, in this state. The legislature might have required all persons to abstain from labor on the first or any other day of the week, without reference to their religious preferences or practices in that regard. But the statute of this state does not go to that length. While the law does not enforce religious duties and obligations as such, it has a tender regard for the conscience and convenience of every citizen in all matters relating to his religious faith and practice. The statute is catholic in its spirit, and accommodates itself to the varying religious faiths and practices of the people. In legal effect it declares every person must observe one day out of seven as a day of rest. But it does not attempt to bind all to the observance of the same day. Such a requirement would have the effect to compel many to observe two days of rest in each week, the statutory day and the day which their religious faith constrained them to observe. The statute designates the first day of the week as the day of rest for all who do not by reason of their religious faith and practice observe some other day. Christians, who regard the first day of the week as a sacred day; infidels, who regard no day as holy; and Friends, who hold there is no more holiness in one day than another, but

that all are to be kept holy, are by the statute constrained to desist from labor on the first day of the week. On the other hand, Jews and Seventh-day Baptists may pursue their ordinary callings on that day, if they observe the seventh day of the week according to their faith; and Mohammedans may labor on the first, if they observe the sixth day of the week according to their faith. The statute grants to all persons, who, in the exercise of their religious faith and practice, observe one day in the week as a day of rest, the liberty of working on every other day of the week, without qualification or limitation. In this respect there is a pronounced difference between the law of this and some of the other states.

In many other states but slight regard is shown to those who observe any other than the first day of the week as a day of rest. The New York statute provides: "Nor shall there be any servile working or laboring on that day, excepting works of necessity and charity, unless done by some person who uniformly keeps the last day of the week, called Saturday, as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time."

The New Jersey statute provides that it shall be a sufficient defence for working on the Sabbath day, that the defendant keeps the seventh day as the Sabbath: "provided, always, that the work or labor for which such person is informed against is done and performed in his or her dwelling-house or workshop, or on his or her premises or plantation, and that such work or labor has not disturbed other persons in the observance of the first day of the week as the Sabbath." And it has been held that whatever draws the attention of others from the appropriate duties of the Lord's day disturbs them. And where one purchased a horse and gave his note for the same, in his own house, in the presence of his wife, the seller, and one other person, whose religious feelings were not at all shocked, and who made no complaint, it was held to be "to the disturbance of others:" *Varney v. French*, 19 N. H. 233.

But the statute of this state draws no such invidious distinctions between those Christians who observe the first and those—be they Christians, Jews or Mohammedans—who observe "any other day of the week, * * * agreeably to the faith and practice of their church or society."

It is not true, therefore, that all contracts made in this state on the Lord's day are void. A large number of the citizens of the

state may lawfully labor and make contracts on that day. There can be no doubt of the validity of a note executed in this state on the Lord's day, when the parties to it refrain from labor on "any other day of the week, * * * agreeably to the faith and practice of their church or society." The validity of contracts made in this state on that day depends, therefore, on whether the parties to them conscientiously observe some other day of the week as a day of rest. If they do, their contracts made on the Lord's day are valid. Such contracts the courts of the state would be bound to enforce. If, then, it would be the duty of the courts of the state to enforce contracts made in the state between its own citizens on the Lord's day, having no relation to "household duties of daily necessity, comfort or charity," how can it be said that the public policy of the state forbids the enforcement of such contracts made in another state, and valid by the law of that state? A court cannot declare that the public policy of the state evinces such a high regard for the sacredness of the Lord's day as to forbid it to enforce a contract lawfully made on that day in another state, when it is bound by law to enforce contracts made on that day in its own state. It may be justifiable in private life to "assume a virtue, though you have it not;" but courts in the impartial administration of justice, are forbidden to assume a higher regard for the holiness of the Lord's day than is found in the constitution and laws of the state. To do so would deprive suitors of their rights without law, and would, besides, be in the highest degree pharisaical. And if the courts of the state would enforce contracts made on that day in the state between certain classes of her own citizens, how can the moral sense of the people of the state be said to be shocked by enforcing such contracts lawfully entered into elsewhere? No court is at liberty to impeach the constitution and laws under which it derives its jurisdiction and authority as a court, by assuming that what is lawful under them is shocking to the moral sense of the people who enacted them. But if no contracts made on that day in the state could be enforced, there would still be nothing in the objection that their enforcement would be too shocking to the moral sense of the community to be tolerated, for reasons forcibly stated by Judge REDFIELD, in delivering the opinion of the court in *Adams v. Gay*, 19 Vt. 358, 367: "And before we could determine that any given cause shocked the moral feelings of the community, we must be able to find but one pervading feeling upon that subject;

so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now, nothing is more absurd to my mind, than to argue the existence of any such universal moral sentiment in regard to the observance of Sunday. It is in no just sense a moral sentiment at all which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit, in the main certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others."

It is believed the moral sense of the community would esteem it a morally dishonest act for a debtor to refuse to pay a just debt because the evidence of it was executed on the Lord's day. Christians vary in their opinions of the manner in which the Lord's day ought to be kept. In continental Europe, sports, games and practices are freely indulged in on that day, with the approval of the church, which the larger number of Protestant churches of England and this country do not approve.

The large emigration from Europe to this country is having a marked influence on public opinion, particularly in towns and cities, as to how the Lord's day ought to be kept. The Puritan view of the question has undergone some modifications through this influence. As a result of less restricted views on the subject, in this city, in the shadow of the capitol there are more than half a hundred places where spirituous liquors are sold on Sunday, the same as any other day in the week, without molestation from the state or city authorities. It would be downright hypocrisy for a court to affect to believe that the moral sense of the community, which supports this condition of things, would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's day. There may be a good many individuals who would feel so, but they do not constitute the community in the legal sense of that term.

It is an error to suppose that the Supreme Court of the state, in *Tucker v. West*, *supra*, held Lord's day contracts void on religious or moral grounds. That is not the ground upon which they are held void by any of the courts. The court held that the execution by the maker and the receipt by the payee of a promissory note was "labor," within the meaning of that word, as used in the statute.

It of course follows that the parties to a note executed on the

Lord's day incur the penalty of the statute against those who labor on that day, viz., a fine of one dollar. By reference to the statute it will be observed that it does not in terms prohibit labor, or declare contracts void. It simply denounces a penalty against those "found laboring." Here two familiar and established rules of decision come into play. One of these is, that a penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue, though there are no prohibitory words in the statute; and the other is, that a court of justice will give no assistance to the enforcement of contracts which the law of the land has interdicted.

"The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction:" *Cranston v. Goss*, 107 Mass. 439; *Holman v. Johnson*, Cowp. 341; *Gibbs & Sterrett Manuf'g Co. v. Brucker*, 111 U. S. 597. There have been vigorous protests from time to time against the application of these principles to Lord's day contracts, upon the ground that they inflicted penalties, by judicial construction, out of all proportion to the offence, and not contemplated by the act (*Bloom v. Richards*, *supra*; and see remarks of GRIER, J., in *Philadelphia, W. & B. Railroad Co. v. Philadelphia & Havre de Grace S. B. Co.*, 23 How. 218); but the great weight of authority is that a contract made in violation of the Lord's day acts is void, like any other illegal and prohibited contract, and upon no other or different ground. And the reason that a contract made in this state on the Lord's day between persons "who observe as Sabbath any other day of the week" is not void, is that the statute expressly declares they "shall not be subject to the penalties of this act," and as there is no prohibition in terms in the statute, it results that there is neither penalty nor prohibition against such persons making contracts or performing any other kind of labor on the Lord's day. But if by the statute all contracts made in this state on the Lord's day were void, it is believed that the result in the case at bar would not be different.

There is often great difficulty in practice in drawing the line between the foreign contracts which may and may not be enforced. The rules defining the comity of states in this regard are necessarily general in their terms, and the adjudged cases are not quite uniform.

No case has been cited, and it is believed none can be found, holding that a contract made on the Lord's day in a state where such contracts are valid, will not be enforced by the courts of another state, by the laws of which such contracts are void. But there is one case at least (there may be others which our limited examination failed to discover) that holds that in such case the contract will be enforced. The case is entitled to consideration, no less on account of the uniform high character of the decisions of the court than the acknowledged learning and ability of the judge who delivered the opinion. In *Adams v. Gay*, *supra*, the precise question arose. A contract which, if it had been made in Vermont, would have been void under the Lord's day act of that state, was made in New Hampshire on the Lord's day. In a suit arising upon that contract in Vermont, the question arose whether the courts of that state would give it effect. The court refused to take judicial notice of the law of New Hampshire, and did not indulge the presumption that it was the same as that of Vermont. The court, Judge REDFIELD delivering the opinion, said: "The law of New Hampshire, then, being out of the case on account of its not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens to see such a contract enforced in a court of justice."

And, after a full discussion of the subject, the court, on the assumption that the contract was valid in New Hampshire, held it valid in Vermont.

It has been decided that contracts for the purchase of lottery tickets, if valid where made, will be treated as valid and enforced in the courts of a state by the laws of which such contracts are illegal: *McIntyre v. Parks*, 3 Metc. 207; (in *Webster v. Munger*, 8 Gray 587, THOMAS, J., expresses the opinion that *McIntyre v. Parks*, was not rightly decided); *Kentucky v. Bassford*, 6 Hill 526. And the same doctrine has been maintained with reference to gambling contracts: Whart. Conf. Laws, §§ 487, 492.

This court is not to be understood as expressing any opinion as to the soundness of the doctrine of the cases last cited. They carry the doctrine of comity further than it is necessary to go to uphold the action in the case at bar. Lottery and gambling contracts are very generally regarded as inherently vicious and immoral, and wanting in a meritorious consideration, whenever and wherever

made. Whereas, the contract in suit was not only obligatory where made, but was made for a valuable and meritorious consideration; and the only objection to its validity is that it was executed on an inappropriate day of the week—a circumstance in which it would seem a state, other than that in which the contract was made, could have very little concern.

It has been held that when the law of the state where the contract was made, and the law of the state where the suit is brought, are the same, and a contract made on the Lord's day is void by the laws of both states, it will not be enforced; and that, in the absence of proof to the contrary, the law will be presumed to be the same in both states: *Hill v. Wilker*, 41 Ga. 449; *Sayre v. Wheeler*, 32 Iowa 559.

COMMON-LAW RULE.—As to the making of contracts, and all other acts not of a judicial nature, the common law made no distinction between Sunday and any other day: *Drury v. Defontaine*, 1 Taunt. 135; *Kepler v. Keefer*, 6 Watts 231; *Rex v. Brotherton*, Stra. 702; *Story v. Elliot*, 8 Cow. 27; *Fox v. Mensch*, 3 W. & S. 444; *Bloom v. Richards*, 2 Ohio St. 387; *Horace v. Keebler*, 5 Neb. 355; *Adams v. Gay*, 19 Vt. 365.

But in England and pretty generally in the United States, more or less stringent laws have been enacted, by which all ordinary labor and business are forbidden.

The principal English statute is that of 29 Car. II., c. 7, § 1. The language is: "that no tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof, (works of "necessity" and "charity" only excepted); and "that no person shall publicly cry, show forth, or expose to sale, any wares, merchandises, fruit, herbs, goods or chattels upon the Lord's Day or any part thereof." Very similar statutes have been enacted in this country.

WORKS OF NECESSITY AND CHARITY.

—Works of "necessity" and "charity" are excepted from the operation of Sunday statutes. And by a work of "necessity," is not meant a physical and absolute necessity, but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case is a case of "necessity" within the statute. *Flagg v. Inhabitants of Millbury*, 4 Cush. 243.

In *McGatrick v. Wason*, 4 Ohio St. 567, the court held that works of "necessity" are not limited to labor for the preservation of life, health or property from impending danger. The "necessity" may grow out of, or indeed be incident to the general course of business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Thus the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so.

The harvesting of "dead-ripe" wheat which could not be cut sooner, and which might be spoiled by rain if left until a later day, is a work of "necessity": *Turner v. State*, 67 Ind. 595. A journey on Sunday to visit one's children who are properly away from home is not against the statute prohibiting travelling on that day: *McCeary v.*

Lowell, 44 Vt. 116; and a journey to procure medicine for a sick child is within the exception: *Gorman v. City of Lowell*, 117 Mass. 65.

Where a defect in a highway, for an injury occasioned by which to person or property the town would be liable, is found to exist on Sunday, it is the duty of such town to repair the defect immediately or to adopt measures to guard against the danger until such repairs can be made; and work, labor, or business for this work is "necessity" within the meaning of the statute: *Flagg v. Inhabitants of Millbury*, *supra*; see *Johnson v. Irasburg*, 47 Vt. 28. Raising subscriptions from a congregation on Sunday to pay off a church debt, or purchase a house of worship, is a work of "charity" within the statute, and subscriptions may be sustained: *Allen v. Duffie*, 43 Mich. 1; *Dale v. Knapp*, 98 Penn. St. 389.

A necessity may exist to work on Sunday to prevent a great waste of sap in making maple sugar: *Whitcomb v. Gilman*, 35 Vt. 297. The feeding of hogs on Sunday is a lawful work; and if, according to the circumstances of the particular case, the usual and proper means to feed, according to the practice of good husbandry, is to gather the necessary feed daily in the field, haul it to the feeding place and there feed it to them, such work is not unlawful: *Edgerton v. State*, 67 Ind. 588.

The running of passenger trains has been held a work of "necessity": *Commonwealth v. L. & N., &c., Ry. Co.*, 80 Ky. 291. And the forwarding of cattle by a railway company: *Phila., &c., Ry. Co. v. Lehman*, 56 Md. 209. See also *Commonwealth v. Sampson*, 97 Mass. 407; *Feital v. Middlesex Ry. Co.*, 109 Id. 398.

But the fact that one works gratuitously does not make it a work of "charity": *McGrath v. Merwin*, 112 Mass. 467. And in *State v. Goff*, 20 Ark. 289, it was held that where a person was too poor and had no implement

of his own with which to cut his grain, which was wasting from over-ripeness, could borrow none till Saturday evening, had swapped work with his neighbors during the week, hired a man to cut his own grain Sunday, it was not a work of "necessity."

A person cannot lawfully travel on Sunday for the purpose of supplying fresh meat to marketmen whom his master has agreed to supply therewith; although he could not do this in addition to his other work on Monday morning, and his master by reason of illness is unable to do it himself: *Jones v. Inhabitants of Andover*, 10 Allen 18.

One who travels on Sunday to ascertain whether a house which he has hired and into which he intends to move the next day, has been cleaned, is not travelling from "necessity": *Smith v. Boston & M. Ry.*, 120 Mass. 490; s. c. 21 Am. Rep. 538.

The cleaning up of a wheelpit on Sunday for the purpose of preventing the stoppage on a week day of mills which employed many hands, is not a work of "necessity" or "charity": *McGrath v. Merwin*, *supra*. And where a contract of hire of a horse and carriage on Sunday was indefinite as to time, distance and use, the carrying of a young lady home who had been attending a religious meeting during the day, will not render the contract legal: *Tillock v. Webb*, 56 Me. 100; and see *Patt v. Wright*, 30 Ind. 476.

"ORDINARY CALLING," "BUSINESS," &c.—All of the English cases carefully distinguish between contracts which are of the "ordinary calling" of the parties, and such as are not in the "ordinary calling." The former made upon Sunday are void; the latter not. This distinction is based upon the words of the English statute of Charles II., which prohibits only work of one's "ordinary calling." And contracts not within this prohibition have always been held valid there: *Drury v. Defontaine*, 1

Taunt. 131; *Fennell v. Ridler*, 5 B. & C. 406. Where the statute merely prohibits the exercise of business or work of one's "ordinary calling," one party cannot sue on the contract made by him on Sunday in the exercise of his ordinary calling, even if it be not within the "ordinary calling" of the other, and the parties meet on that day at the request of the latter: *Hazard v. Day*, 14 Allen 487. But where the contract is made in the "ordinary calling" of one party, the other may sue if it was not within his own "ordinary calling," and he did not know, when he entered it, that it was within the "ordinary calling" of the defendant: *Bloxsome v. Williams*, 3 Barn. & C. 232; s. c. 1 C. & P. 294.

The party seeking to impeach a contract because made on Sunday, must show that it was done by a person in the exercise of the business of his "ordinary calling:" *Mills v. Williams*, 16 S. C. 593; *Hellams v. Abercombie*, 15 Id. 110.

Where a farmer, a part of whose ordinary business was the purchase and cultivation of land, bought a tract of land on Saturday and agreed to consummate the trade on the next day, by signing the necessary papers, and did sign a note for the purchase-money on that day; held, that the contract was illegal: *Morgan v. Bailey*, 59 Ga. 683.

The loaning of money on Sunday is "business," within the statute, and presumptively illegal: *Troewert v. Decker*, 51 Wis. 46. And the execution and delivery of a promissory note: *Allen v. Deming*, 14 N. H. 133.

Where a town board is authorized to issue bonds in aid of a railway, only upon the presentation of a petition therefor, signed by a certain number of taxpayers of the town, the procuring and affixing such signatures on Sunday, is "business" and is unlawful, and confers no authority upon the supervisors to issue bonds: *De Forth v. Wis. &c., Ry.*, 52 Wis. 320.

But the execution of a mortgage is not

the exercise of one's "ordinary calling:" *Hellams v. Abercombie*, 15 S. C. 110. Nor is an agreement by an attorney to settle a client's affairs, by which he incurs personal responsibility, his "ordinary calling:" *Peate v. Dicken*, 5 Tyr. 116; s. c. 3 Dowl. P. C. 171. And a contract of hiring between a farmer and a laborer for a year and a day is valid: *Rex v. Whitnash*, 7 Barn. & C. 596. And in *Scarfe v. Morgan*, 4 Mees. & W. 270, it was held, that where a mare was sent to a farmer to be covered by his stallion, the case was held not to be within the statute prohibiting the exercise of one's "ordinary calling."

The simple making of a contract is not embraced in the prohibition of "common labor:" *Horace v. Keebler*, 5 Neb. 358; *Johnson v. Brown*, 13 Kan. 529; *Bloom v. Richards*, 2 Ohio St. 388.

WHEN CONTRACT DEEMED MADE ON SUNDAY.—In some of the New England States, Sunday, or the first day of the week, begins at sunset on Saturday evening and ends the same time the next day: 2 Bour. Dict. 559, 14th ed. In other parts of the United States, it commences at 12 o'clock on the night between Saturday and Sunday, and ends twenty-four hours later. See *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Kilgor v. Miles*, 6 Gill & J. (Md.) 268.

In *Nason v. Dinsmore*, 34 Me. 391, it was held that a contract proved to have been made on Sunday is not thereby rendered invalid unless it be also proved that it was made before sunset. The presumption is that it was made on that part of the day on which it was lawful to do it: *Hiller v. English*, 4 Strobb. 486. In Connecticut, the Lord's day has been defined as continuing from daybreak to the closing of daylight on Sunday: *For v. Abel*, 2 Conn. 251; see, also, *Tracy v. Jenks*, 15 Pick. 465.

Where A. bought a quantity of shingles on Sunday, and at the same time gave a note for part payment, and he permitted the shingles to remain with the seller for

about a month, *Held*, that the contract was complete on Sunday, and void: *Allen v. Deming*, 14 N. H. 133.

A letter written Saturday, left by the writer on Sunday with a request to carry it to the post-office Monday, may be the medium of accepting a prior proposition from the person to whom it is addressed, and thus closing a lawful contract dating from Monday, the time when the letter was posted in pursuance of the Sunday request: *Bryant v. Booze*, 55 Ga. 439.

Where a contract for an exchange of horses, made on Saturday, included the discharge of a debt due from one of the parties to the other, but the purchaser of the horse took possession of it Sunday. *Held*, that there was such a consummation of the contract on Saturday as made it valid: *Peake v. Conlan*, 43 Iowa 297.

Where goods are selected and set apart and the prices agreed upon on Sunday, but, by the contract, they are not to be delivered till the next day, and they are not delivered till then, the transaction can not be avoided as a sale made on Sunday: *Rosenblatt v. Townsley*, 73 Mo. 536.

Payments made on Sunday and not returned, but allowed on a final accounting, will not avoid the contract on which they were received as one made in violation of the Sunday law: *Lamore v. Frisbie*, 42 Mich. 186.

WHAT CONTRACTS VOID.—The ground upon which courts have refused to sustain actions on contracts made in contravention of statutes for the observance of Sunday, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction: *Cranston v. Goss*, 107 Mass. 439; *Ellis v. Hammond*, 57 Ga. 179. Each party is *in pari delicto*, and no relief can be granted because it was made by one of them in the exercise of his common avocation: *Berry v. Planters' Bank*, 3 Tenn. Ch. 69.

In Kansas, a contract made on any day to perform any kind of labor on Sunday, works of necessity, &c., excepted, is void; but a contract made on Sunday to perform labor on any other day, is valid: *Johnson v. Brown*, 13 Kan. 529.

The owner cannot recover compensation for the use of a horse for a pleasure drive on Sunday: *Nodine v. Doherty*, 46 Barb. 59; *Stewart v. Davis*, 31 Ark. 518. In any case where the hiring is uncalled for, either by necessity or charity, the contract is void: *Whelden v. Chappel*, 8 R. I. 230; *Smith v. Rollins*, 11 Id. 464.

A common carrier's liability for carrying live stock is not lessened by reason of their being received or carried on Sunday: *Phila., &c., Ry. v. Lehman*, 56 Md. 209; see, also, *Opshal v. Judd*, 30 Minn. 126.

A contract for the sale and warranty of a horse on Sunday is void: *Fennell v. Ridler*, 5 B. & C. 405. And a loan of money on Sunday is void and cannot be enforced, whether in writing, verbal, or implied: *Meador v. White*, 66 Me. 90; *Finn v. Donahue*, 35 Conn. 216.

In *Day v. McAllister*, 15 Gray 433, it was held that a contract made in violation of the Sunday law is absolutely void.

A musician cannot recover for his services at a beer garden on Sunday: *Bernard v. Lüpping*, 32 Mo. 341.

An action will not lie for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel on Sunday, and retained by defendant afterwards, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by defendant: *Myers v. Meinrath*, 101 Mass. 366.

The performance of any work on Sunday being expressly prohibited, any contract having for its consideration, or part of it, the doing of work on that day, cannot be enforced: *Slaze v. Arnold*, 14

B. Mon. 287; see *Pute v. Wright*, 30 Ind. 476; *Sumner v. Jones*, 24 Vt. 317; *Smith v. Sparrow*, 4 Bing. 84.

Where there is a contract to publish an "ad." in the Sunday edition of a paper for a year, it will not be presumed that the contract contemplated any labor to be done on Sunday: *Sheffield v. Balmer*, 52 Mo. 474. See *Nason v. Dinmore*, 34 Me. 391. But in *Smith v. Wilcox*, 25 Barb. 341, it was held that a contract to publish an "ad." in a paper issued on Sunday is an agreement to do an act prohibited by the statute relative to servile labor on that day, and the price cannot be recovered. This case was affirmed in 24 N. Y. 353. But under the laws of 1871, such contracts are now legal.

The rescission of a contract is as much a matter of business as the making of it, and is void: *Benedict v. Bachelder*, 24 Mich. 425; 9 Am. R. 130. See *Merriut v. Robinson*, 35 Ark. 483.

A city ordinance which gives Jews the privilege of trading on Sunday, but denies it to others, is unconstitutional: *City of Shreveport v. Levy*, 26 La. Ann. 671.

But in *Johns v. State*, 78 Ind. 332, it was held that a statute against the desecration of the Sabbath, which provides that "nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as Sabbath," is not unconstitutional, as granting certain citizens privileges, &c., which shall not belong to all persons.

Sunday contracts are void, and the burden of proof showing that the case falls within some of the exceptions of the statutes, is on the party claiming it: *Sayre v. Wheeler*, 32 Iowa 559. See *Albrecht v. State*, 8 Tex. App. 313. Two joined in one complaint for doing work on Sunday may be jointly convicted, upon proof of a joint act in violation of the statute: *Commonwealth v. Sampson*, 97 Mass. 407.

(For instances of negotiable paper, VOL. XXXIII.—50

void because issued on Sunday, see subtitle "NEGOTIABLE PAPER," *infra*, p. 394.)

WHAT CONTRACTS VALID.—Where the contract is fully executed on Sunday, and the property passes, the sale is nevertheless valid: *Godfrey v. Greene*, 44 Me. 25.

A contract made on Sunday by the overseers of the town for the relief of a sick pauper, is valid: *Aldrich v. Inhabs. Blackstone*, 128 Mass. 148. And money paid on Sunday and retained afterwards, discharges debt: *Johnson v. Willis*, 7 Gray 164.

A deed though signed and acknowledged on Sunday, if delivered on another day is valid, whatever may be the effect on the acknowledgment: *Love v. Wells*, 25 Ind. 503.

A deed executed on Sunday cannot for that reason be avoided by a third party, who is a stranger to the transaction, claiming by a subsequent levy: *Greene v. Godfrey*, 44 Me. 25. And where a deed is executed on Sunday, but by the procurement of the grantor, dated upon the preceding day, he cannot assert the invalidity against a subsequent *bona fide* holder: *Love v. Wells*, *supra*.

In *Breitenman's Appeal*, 55 Penn. St. 183, it was held that any instrument which does not take effect till delivery is not void because signed on Sunday.

A will executed on Sunday is valid: *Bennett v. Brooks*, 9 Allen 118; *Breitenman's Appeal*, *supra*.

Bail-bond executed on Sunday is binding on the sureties: *Watts v. Commonwealth*, 5 Bush (Ky.) 309. And a bond void because issued on Sunday, may be used as an admission of a liability: *Lea v. Hopkins*, 7 Penn. St. 492.

An agreement to settle an action may be made on Sunday: *Shank v. Shoemaker*, 18 N. Y. 488. And the execution of a release by a creditor to an assignee, under a voluntary assignment, by delivery on Sunday is not void, not being labor, business or work of one's ordinary

calling: *Allen v. Gardiner*, 7 R. I. 22; see *Hazard v. Day*, 14 Allen 487; *Tucker v. West*, 29 Ark. 386.

A bill of sale of personal property, drawn and executed on Monday, is not void by reason of an account of stock having been taken on Sunday: *Luebbering v. Oberkoetter*, 1 Mo. App. 393.

And the fact that the indebtedness was for liquors sold on Sunday contrary to law, is no bar to an action on account stated, provided the account was not stated on Sunday: *Melchoir v. McCarty*, 31 Wis. 253.

The statute does not apply to the proceedings of business meetings of benevolent societies held on that day: *Corrigan v. Young Mens', &c., Society*, 65 Barb. 357.

A contract for the sale of property made upon Sunday, is not for that reason void. To bring a transaction within the statute which declares that no person shall expose for sale any wares, &c., on Sunday, clear proof of its violation must be produced. A private sale of property not "exposed to sale," is not within its provisions: *Eberle v. Mehrbach*, 55 N. Y. 682; see *Melvin v. Easley*, 42 N. C. 356.

If goods are sold and delivered to A. and B. on the Lord's day, the sale being induced by the false representations of A. on a previous day, and subsequently, not on Sunday, the seller demands the price of A., and he promises to pay it, this amounts to a sale to him, and he is liable for the price: *Winchell v. Carey*, 115 Mass. 560.

A contract for the transportation of property on Sunday is valid: *Merritt v. Earle*, 29 N. Y. 121; see *Carroll v. Staten Id. Ry. Co.*, 58 N. Y. 126.

In *Meriweather v. Smith*, 44 Ga. 542, the court said: "A clear distinction is made by the authorities between a suit to enforce a promise or undertaking entered into on Sunday, and a suit on a contract made on Sunday for work and labor, and for the doing anything, where

the thing to be done is afterwards performed by the party. It would be a fraud in one who has received the consideration of a contract on a week day, to set up the invalidity of the contract because made on Sunday. He reaffirms the contract by receiving the consideration." See *Dickenson v. Richmond*, 97 Mass. 45; *Blood v. Bates*, 31 Vt. 147. In order to render the contract void, it must appear that the party seeking to enforce it, had some voluntary agency in consummating it on Sunday: *Sargeant v. Butts*, 21 Vt., 99.

In *Dinsmore v. N. Y. Board of Police*, 12 Abb. N. C. 436, an injunction was granted to restrain the board of police from interfering with an express company's transportation of freight between states of the United States, but denied as to domestic matters, that is as to goods to be received and delivered within the city of New York: See *Adams Express v. N. Y. Board Police*, 65 How. Pr. 72.

NEGOTIABLE PAPER—WHEN VOID.—A promissory note, made on Sunday, is, as between the original parties, void. *Pope v. Linn*, 50 Me. 83; *State Cap. Bank v. Thompson*, 42 N. H. 369; *Bank of C. v. Mayberry*, 48 Me. 198. But if delivered on another day, it is valid: *Goss v. Whitney*, 24 Vt. 187; *King v. Fleming*, 72 Ill. 21; *Hilton v. Houghton*, 35 Me. 143; *Bank of C. v. Mayberry*, *supra*. But in *Parker v. Pitts*, 73 Ind. 597, it was held that the execution of a promissory note, as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety is void. See *Chrisman v. Tuttle*, 59 Ind. 155; *Saltmarsh v. Tuthill*, 13 Ala. 390.

The consideration of a note given for an injury done on the Lord's day to a horse and carriage hired on that day for any purpose than that of necessity or charity, is unlawful: *Tillock v. Webb*, 56 Me. 100.

A note made on Sunday is not void at

common law, and in a suit on a foreign note, any foreign statute invalidating it must be proved: *O'Rourke v. O'Rourke*, 43 Mich. 59.

And a note executed on Sunday is good in the hands of an innocent holder before maturity: *State Cap. Bank v. Thompson, supra*. And a bill of exchange under like circumstances is valid: *Begbie v. Levi*, 1 C. & J. 180. And a note signed and delivered on Sunday, but dated on week day, is valid in the hands of a *bona fide* holder without notice of the defect: *Bank of C. v. Mayberry, supra*; *Knox v. Clifford*, 48 Wis. 651; *Cranston v. Goss*, 107 Mass. 439; *Vinton v. Peck*, 14 Mich. 287; *Ball v. Powers*, 62 Ga. 757. The making and delivering on a secular day of a promissory note, dated to take effect on a subsequent Sunday, is not work or labor prohibited by the statute: *Stacy v. Kemp*, 97 Mass. 166.

It is no ground for arresting judgment in an action on a promissory note, that it bears date on Sunday: *Hill v. Dunham*, 7 Gray 543; see *Stevens v. Wood*, 127 Mass. 123.

SUBSEQUENT RATIFICATION. — The rule is that as between the parties a contract made in violation of the Sunday law, is void and is incapable of being ratified: *Pope v. Linn*, 50 Me. 83; *Day v. McAllister*, 15 Gray 433; *Stevens v. Wood*, 127 Mass. 123; see also *Parker v. Pitts*, 73 Ind. 598.

A contract for the transmission of a telegraph dispatch on Sunday is void, and the retention of the dispatch and the consideration paid by the sender does not constitute a ratification: *Rogers v. W. U. Tel. Co.*, 78 Ind. 169.

A Sunday horse trade can not be ratified on a week day; and if possession is given, the horse can be reclaimed, unless a new contract is made with mutual assent: *Winfield v. Dodge*, 45 Mich. 355. A note illegal because issued on Sunday is incapable of ratification: *Stevens v. Wood, supra*.

Part payments made on Sunday will not take a debt out of the statute of limitations: *Clapp v. Hale*, 112 Mass. 368. And a subsequent promise to pay a debt, whether express or implied if made on Sunday, does not take the debt out of the statute: *Bumgardner v. Taylor*, 28 Ala. 687. But *contra*, *Thomas v. Hunter*, 29 Md. 406; *Beardsley v. Hall*, 36 Conn. 270.

Where the terms of a contract only are agreed upon on Sunday, and subsequently executed it may be enforced: *Bulter v. Lee*, 11 Ala. 885.

The mere fact that a person borrowing money retains and converts it to his own use, does not raise an implied promise binding in law. *Troewert v. Decker*, 51 Wis. 46. In *Bradley v. Rea*, 14 Allen 20, affirmed 103 Mass. 188, it was held that if a bargain is made on Sunday for the sale of goods, which are accordingly delivered and accepted by the purchaser on Monday, the vendor may maintain an action to recover the value of the goods, upon implied assumpsit; but the price fixed on Sunday will not be binding, nor will either be bound by any warranty made on that day. And in *Love v. Wells*, 25 Ind. 503, it was held that a contract void only because executed on Sunday constitutes an exception to the general rule that void contracts are not susceptible of ratification: *Sargeant v. Butts*, 21 Vt. 99. See *Van Hoven v. Irish*, 3 McCrary C. C. 443; *Heller v. Crawford*, 37 Ind. 279; *Melchoir v. McCarthy*, 31 Wis. 252.

Where a promissory note made by two, one of whom signed it on Sunday, was, on a subsequent day delivered by one of the makers to the payee who was ignorant of the fact that it had been signed on Sunday, it was held that such delivery was a subsequent ratification and made it valid: *King v. Fleming*, 72 Ill. 21. Where S. sold a horse to J. on Sunday, for which J. gave a note, and afterwards made two payments upon the note, and retained the horse without

offering to return the same, *Held* to amount to a ratification, and that S. was entitled to recover for the balance of the note: *Sumner v. Jones*, 24 Vt. 317. See also *Harrison v. Colton*, 31 Iowa 16; *Merrill v. Downs*, 41 N. H. 72.

TORT GROWING OUT OF SUNDAY CONTRACT.—The general principle is that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of action is in contract or in tort, the test in each case is whether, where all the parties are disclosed, the action appears to be founded in violation of law in which the plaintiff has taken part: *Hall v. Corcoran*, 107 Mass. 251. Thus, the sale or exchange of horses consummated on Sunday is void, and no action will lie on the warranty: *Finley v. Quirk*, 9 Minn. 195; *Murphy v. Simpson*, 14 B. Mon. 419; *Lyon v. Strong*, 6 Vt. 219; *Robeson v. French*, 12 Met. 24.

And a person who travels on Sunday in violation of the Lord's day act cannot maintain an action against a town for a defect in a highway, or against the proprietors of a street railway, in whose cars he is a passenger, for an injury to himself from their negligence, because his own fault in illegally travelling on the Lord's day necessarily contributed to the injury: *Bosworth v. Swansey*, 10 Met. 363; *Jones v. Andover*, 10 Allen 18; *Stanton v. Metropolitan Ry. Co.*, 14 Allen 485.

An action of tort will not lie, if to establish it the plaintiff requires aid from or is under the necessity of showing or depending upon an illegal Sunday contract: *Smith v. Rollins*, 11 R. I. 464; *Whelden v. Chappel*, 8 R. I. 230. And where the plaintiff sustained personal injuries from the negligence of the defendant while assisting them in their work on Sunday, it was held that his illegal act in working on Sunday was so inseparably

connected with the cause of action, as to prevent his maintaining the suit: *McGrath v. Merwin*, 112 Mass. 467; see also *Ladd v. Rogers*, 11 Allen 209; *Simpson v. Nicholls*, 3 Mees. & W. 240; *Gunderson v. Richardson*, 56 Ia. 56.

And in *Gregg v. Wyman*, 4 Cush. 322, it was held that if the owner of a horse knowingly lets him, on the Lord's day, to be driven to a particular place, but not for "necessity or charity," and the hirer injures the horse by immoderate driving, the owner cannot maintain an action against him for such injuries, although occasioned in going to a different place, and beyond the limits specified in the contract. But the case of *Gregg v. Wyman*, was directly overruled in *Hall v. Corcoran*, 107 Mass. 251.

Said the court: "It appears to us, upon principal and authority, that an action of tort for the conversion of a horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think that it is equally clear, that the contract need not be shown by the plaintiff, and forms no part of his cause of action. * * * The wrong committed by the defendants, for which they are now sued, was not a breach of the illegal contract by which the plaintiff put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent, but is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties by the wrongful driving of the horse beyond the place agreed upon, and thus assuming control of the property for their own benefit, without any authority or license from the owner." The doctrine of the above case is sustained by *Woodman v. Hubbard*, 25 N. H. 67; *Mortan v. Gloster*, 46 Me. 530. But in *Parker v. Latner*, 60 Id. 528; s. c. 11 Am. R. 210, it was held that an action will not lie to recover damages arising from the immoderate driving of a

horse during a pleasure drive on the Lord's day, for which he was hired.

But if the hirer of a horse injures the property, or suffers it to be injured through his negligence, the owner may recover, although the contract be void : *Nodine v. Doherty*, 46 Barb. 59 ; see *Merritt v. Earle*, 29 N. Y. 121 ; *Carroll v. Staten Id. Ry. Co.*, 58 N. Y. 126 ; *Bertholf v. O'Reilly*, 8 Hun 16 ; affirmed 18 Abb. L. J. 389 ; *Stewart v. Davis*, 31 Ark. 518 ; see also, *Dodson v. Harris*, 10 Ala. 566.

If a person while unlawfully travelling

on Sunday is injured by a dog, the act of travelling is not a contributory cause of the injury, and he may recover : *White v. Lang*, 128 Mass. 598. And in *O'Shea v. Kohn*, a recent case in the New York Supreme Court, published in 17 Chicago Leg. News 15, Sept. 20, 1884, the court held that the law would not permit a person, by means of false representations, to obtain the goods or property of another and escape liability upon the fact that the wrong was perpetrated on Sunday.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of California.

HAGERTY v. POWERS.

A parent who wilfully and negligently permits his son of eleven years of age to have in his possession a loaded pistol, whereby the boy injures the infant child of another, is not liable in damages therefor.

MYRICK, J., dissents.

IN banc. Appeal from the Superior Court of the county of Sacramento.

Grove L. Johnson and *Jones & Martin*, for appellant.

Elwood Bruner and *S. P. Scanaker*, for respondent.

The opinion of the court was delivered by

ROSS, J.—The question in this case is whether the defendant, who, according to the averments of the complaint, “wilfully, carelessly and negligently suffered, permitted, countenanced and allowed” his son of eleven years of age to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled as to shoot the infant child of the plaintiff, is liable in damages therefor. We have been cited to no case, controlled by the principles of the common law, that holds that the action, under such circumstances, can be maintained. It seems, that under the civil law it may be ; and such an action was lately sustained by the Supreme Court of Louisiana, in the case entitled *Marionneaux v. Brugier*, reported in the sixteenth volume of the Reporter, page

208. Pothier, in his work on Obligations, says: "The doctrine that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the English law." Volume 2, page 34.

In *Tift v. Tift*, 4 Denio 177, a minor daughter of the defendant, in her father's absence, and without his authority or approval, wilfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was bitten and killed; and the court held that the father was not, but the child was, liable in damages. To the same effect are a number of cases cited in Schouler, Dom. Rel. sect. 263, from which he deduces the rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child.

Under this rule, it is quite clear that the averments of the complaint do not fix upon the defendant any liability for the damages suffered by the plaintiff.

Judgment affirmed.

MYRICK, J., dissenting.—I dissent. As the complaint alleges that the father wilfully, carelessly and negligently countenanced his child in having the pistol, it is sufficient to show a cause of action.

The principal case is an interesting addition to the scanty literature upon the liability of the father for the torts of his minor children. The case of *Hooverton v. Noker*, Sup. Ct. of Wisconsin, 23 Am. L. Reg. (N. S.) 670, is somewhat similar in its facts. In this case the father was held liable for injuries received by the plaintiff, caused by the frightening of her horse by the two boys of the defendant, who shouted and fired pistols as she passed their father's premises. In order to connect the defendant with the acts of his sons it was held proper to show that such acts had often been done by the boys in the presence of their father prior to the day when the plaintiff was injured. In delivering the opinion of the court, TAYLOR, J., said: "If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the

highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing; and when an injury did happen from that cause, he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made."

The case of *Beedy v. Reding*, 16 Me. 362, may be profitably consulted in this connection. In this case the minor sons of the defendant, being at the same time members of his family, with the defend-

ant's team hauled away the plaintiff's wood. "This (the court say) could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. *Qui non prohibet cum prohibere possit, jubet*. And the maxim may be applied with great propriety to minor children residing with and under the control of their father." See, also, *Dunks v. Grey*, 3 Fed. Rep. 862, 864; also, *Morgan v. Thomas*, 8 Exch. 304, where the above maxim is quoted with approval by PARKE, B.

If the above cases are correct, the principal case can hardly be supported. The only way in which it can be distinguished, as it seems to us, is on the ground that the neglect of the parent was not the proximate cause of the damage sustained by plaintiff; but this distinction seems illusory. Although the damage was not

perhaps a necessary consequence of the defendant's negligence, it was a natural consequence and one that any prudent man ought to have foreseen. If we concede the above maxim to be a correct statement of a legal principle; if it was the parent's duty to withhold from his infant son so dangerous a weapon, as would seem to be clear upon common-sense principles as well as established by the authorities above cited, then the conclusion seems obvious that he is responsible for the natural consequences of his omission to perform this duty. On principles of policy as well as upon legal principle, it would seem that the father ought to have been held to respond in damages in the principal case. Still the question is not free from difficulty, and perhaps it may finally be settled adversely to the opinion here expressed.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Missouri.

ASKEW v. LA CYGNE EXCHANGE BANK ET AL.

A voluntary *bona fide* assignment of personal property, wherever situated, passes it to the assignee at the time of the assignment, and will have priority over subsequent lienors, provided it is not in conflict with some positive or customary law of the state where the property may be located.

The L. bank of the state of Kansas made an assignment in that state for the benefit of its creditors of all of its personal property to J. E. M., a resident of the same state, including a debt due to L. bank from M. bank of the state of Missouri, payable in the latter state. The assignment conformed with the laws of Kansas, and would have been valid had it been executed in Missouri—the assignment laws of the two states being substantially the same. H. A., a creditor of L. bank, and a citizen of Missouri, instituted an attachment suit against L. bank in the courts of the latter state, and garnished this debt in the hands of the M. bank. J. E. M., the assignee of the L. bank, interposed an interplea, claiming to be the owner of the debt. *Held*, that as between the attaching creditor and the assignee, the title of the latter would prevail.

THE opinion of the court was delivered by

EWING, Commissioner.—The appellant, on the 27th of February 1880, brought this suit against the La Cygne Bank, a banking corporation created under the laws of the state of Kansas, and there-

tofore doing business as such at La Cygne in that state. The suit was by attachment, and notice of garnishment was on the same day served on the Merchants' National Bank of Kansas City, as garnishee.

In due time the garnishee answered, stating that at the time the notice was served, it had in its possession the notes of several parties which had been placed in its hands by the Kansas bank as collateral security for a debt owing by the latter to the garnishee.

After this answer was filed the respondent, Moore, as assignee of the Kansas bank, filed his interplea claiming to be the owner of the notes, subject only to the lien of the pledge mentioned in the garnishee's answer.

The appellants answered to the interplea denying the claim set up.

The garnishee's answer was taken as true by all parties to the suit, and the contest between the appellants and respondent was over the surplus which it was supposed would remain in the hands of the garnishee after the payment of the debt due to it.

The issue between the interpleader and appellants was tried by the court, without a jury, upon the facts as agreed upon by the parties, and which were substantially as follows: The La Cygne Exchange Bank was a banking corporation organized under the laws of the state of Kansas, and had been doing business as such at La Cygne, in the county of Miami, in said state, since the year 1876. At noon, on February 25th 1880, the bank made an assignment of all its property and effects for the benefit of all its creditors. This assignment was made in conformity with the laws of the state of Kansas upon that subject. Immediately upon the making of the assignment the assignee took possession of the property and effects. The interpleader is the assignee, and undertook the execution of his trust, and all the proceedings of the assignee subsequent to the making of the assignment had been in strict conformity to the laws of the state of Kansas. The property attached in the garnishee's hands had been pledged to the garnishee bank by the debtor bank long before the assignment, as collateral security for certain debts due by the latter to the former. The appellants were residents and citizens of Missouri; the garnishee bank was located in Missouri, and the debt payable in Missouri.

The laws of the state of Kansas governing assignments for the

benefit of creditors were made part of the case, and were in all material matters substantially the same as those of Missouri upon the same subject.

The court refused to declare the law to be that upon the pleadings and evidence the interpleader could not recover, and made its finding for the assignee (the interpleader), and rendered judgment accordingly.

The attaching creditors took this appeal.

It will be seen that the precise legal proposition we have to decide is this: Does a voluntary assignment, for the benefit of all the creditors of the assignor, made in the state of Kansas, of a debt due from a citizen and resident of this state to the assignor, a resident of Kansas, pass the debt to the assignee at the time of the assignment, so as to defeat a subsequent attaching creditor of the assignor in this state, whose attachment is issued and the debtor of the assignor garnished, after the making of the assignment.

There has been much discussion of questions similar to this, but it will neither be necessary or profitable to undertake a thorough review of the conflicting adjudications.

The case of *Bryan v. Brisbin*, 26 Mo. 423, is similar to the one at bar, with the important exception that in that case the deed of assignment was in conflict with the laws of Missouri and could not have been enforced here; while it is admitted that the assignment in the case at bar would be valid in Missouri.

In *Einer v. Beste*, 32 Mo. 240, the plaintiff and defendant were both residents of Louisiana. The defendant was insolvent and had instituted proceedings for discharge under the insolvent laws of Louisiana. The plaintiff, by a suit of attachment in this state, sought to obtain priority of the other creditors. After a somewhat exhaustive review of the authorities, Judge BAY held that the assignment was good as against this attaching creditor. The same question was similarly decided by this court in *Thurston v. Rosenfeld*, 42 Mo. 474.

In *Ockerman v. Cross*, 54 N. Y. 29, it is held that a voluntary assignment by a debtor residing in another state, valid by the laws of that state, and not in conflict with any law of New York, operates as an assignment of the debtor's property in New York, and the assignees can hold the same against attaching creditors of the debtor. See, also, to the same effect, 40 Barb. 465.

In *Speed v. May*, 17 Penn. St. 91, it was held that "a voluntary
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assignment made by the owner in Maryland, who resided there, passed property in Pennsylvania to the assignee as against an attachment subsequent to the assignment."

The same question is similarly decided in *Hanford v. Paine*, 32 Vt. 442; *Gatewood v. Whitlock*, 9 Fla. 86; *Miller v. Kanaghan*, 56 Ga. 155; *Gregg v. Sloan*, 76 Va. 497; *Law v. Mills*, 18 Penn. St. 185; *Johnson v. Sharp*, 31 Ohio St. 611; *May v. Wannemacher*, 111 Mass. 202; *Caskie v. Webster*, 2 Wall. 131.

Mr. Justice STORY, in discussing the question (Story on Conflict of Laws, sect. 411) says: "There is a marked distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law, in cases of bankruptcy, *in invitum*. * * * In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate on any property except that which is in its own territory. This makes a solid distinction between a voluntary conveyance of the owner, and an involuntary legal conveyance by the mere authority of law. The former has no relation to place, the latter on the contrary has the strictest relation to place." And he concludes by saying: "It is, therefore, admitted that a voluntary assignment by a party, according to the law of his domicile, will pass his personal estate, whatever may be its locality, abroad as well as at home. But it by no means follows that the same rule should govern in cases of assignment by operation of law." See note 2 to this section. Such an assignment would, if valid when made, be upheld in the state where the property is found, unless its operation is limited or restrained by some law or policy of the latter: *Hanford v. Paine*, *supra*; *Ockerman v. Cross*, *supra*. Burrill on Assignments, sects. 302 and 309, maintains the same general doctrine.

A contrary doctrine seems to prevail, according to some authorities cited by the appellant. One is the case of *Johnson v. Parker*, 67 Ky. 149, but that is virtually overruled by a much later decision (1884) in *Atherton v. Evers et al.*, 20 Fed. Rep. 894, where the general rule as referred to is maintained.

He also refers to other cases seemingly irreconcilable. But, notwithstanding, we think it may be assumed from the weight of authority that the true rule is, that *involuntary* assignments by operation of law do not operate beyond the territory of the state

under the laws of which such compulsory assignment may be made; but that *voluntary, bona fide* assignments of personal property, wherever situated, pass it to the assignee at the time of the assignment, and will have priority over subsequent leinors, provided it is not in conflict with some positive or customary law of the state where the property may be located.

It is admitted in this case that the assignment laws of Kansas and Missouri are substantially similar, and that the assignment under consideration would be valid if made in this state.

It also appears that the attaching creditor can claim no preference over the general creditors in point of merit.

We must therefore hold that the assignee will take the property in preference to the attaching creditor, and there is nothing in the law nor inter-state comity which would justify the courts of this state in holding otherwise.

The judgment below is therefore affirmed. All concur.

HOUGH, C. J.—Adopted as the opinion of the court and judgment will be entered accordingly.

Where the question involved in the principal case has presented itself, courts have adopted many conflicting and irreconcilable theories as to the principles which should govern their decisions. Many have held to the notion that in *all cases* the law of the domicile of the owner, *lex domicilii*, should control the disposition of *all* personal property, whether corporeal movables or choses in action, while others have maintained that the law of the place where the property is actually situated, *lex rei situs*, determined its transfer.

The rule that the law of the forum, *lex fori*, is the test of its validity, has been adopted in numerous cases. And in cases of debt another theory has been advanced, that is, that the law of the place of payment is the criterion, because that is where the debt will ultimately go. See Wharton on Conflict of Laws (2d ed.), § 359 *et seq.*; Story on Conflict of Laws (8th ed.), § *et seq.* 385.; Burrill on Assignments (4th ed.), § 301 *et seq.*

As a general rule, personal property

has no locality, no *situs*, but follows the person of the owner. It is, therefore, governed in its transfer or disposition by the law of the domicile of its owner, by the law of the place where the transfer is made, without regard to the locality where it may be actually situated, so that if a sale be valid where made, it is valid everywhere. 1 Kames's Eq., p. 355, c. 8, s. 3; Story on Conflict of Laws (8th ed.), p. 546. Though this is not a universal rule, but subject to certain well-founded exceptions. The question depends largely upon the manner of the transfer, the nature of the property and the effect upon the rights of citizens in the place where the property is situated. One exception to the rule is, that an assignment is not valid of property in another state, as against citizens of that state, if it is repugnant to the policy or positive institutions of such other state. This exception rests on the ground that there is no comity which requires a state to enforce transfers which are detrimental to her own citizens. The cases generally

sustain this exception, yet, as will be seen, a few repudiate it, because of the narrow and illiberal policy which it is supposed supports it. 2 Kent Com. 455. *Caskie v. Webster*, 2 Wall. Jr. 131, does not sustain the exception. This case states the law to be, that the legal *situs* of movables follows the domicile of the owner, and that the law of the actual *situs* protects the claims of creditors domiciled there only against transfers by operation of law. In *Caskie v. Webster*, the assignment was made in Virginia, by a citizen of that state. The transfer was good by the laws of Virginia, and included a debt as one item of his property due to the assignor from a citizen of Pennsylvania. Tested by the laws of Pennsylvania, the assignment was invalid. Before the assignee could collect this debt, a Pennsylvania creditor of the assignor attached it. It was held that the assignment effectually transferred the debt to the assignee. GRIER, J., in giving the opinion, said: A debt is a mere incorporeal right. It has no *situs*, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the laws of his domicile, * * * will operate as a transfer of the debt, which should be regarded in all places. In America, bankrupt or insolvent assignments by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the laws of the owner's domicile, is valid everywhere. I know there are some cases to be found in which the courts of some states of this union have decided that a voluntary assignment for the benefit of creditors, valid by the laws of the creditor's domicile, will be disregarded where it is prejudicial to the interests of the attaching creditors in other states, or invalid by the laws of the state where the debt or the property is attached."

Speed v. May, 17 Penn. St. 91.

is likewise against sustaining the exception. The assignment was voluntary, and made in Maryland, by a citizen of Maryland, and good by the laws of that state. It included a debt due from a citizen of Pennsylvania to the assignor. This debt was attached by a Pennsylvania creditor of the assignor before the assignee got possession of it. GIBSON, C. J., who gave the opinion, said: "The legal *situs* follows the domicile of the owner, and the law of the actual *situs* protects the claims of domiciled creditors there only against transfer by operation of law. * * * Granting, for the sake of argument, that the actual *situs* of the debt in question was in Pennsylvania, the voluntary assignment of it in Maryland, by the owner of it, vested it in the trustees there against their creditors here. The assignment was as operative to transfer the property in the first instance, as it would have been had it been executed by a citizen of Pennsylvania." In answer to the objection that the assignment should not be sustained because it did not conform to the laws of Pennsylvania, the chief justice observed: "The legal presumption is, that it was intended to be performed at the place where it was made; and, as there is nothing to rebut it, the law of the contract is the law of the place of its origin. * * * The *lex loci contractus* determines the validity of the contract; the *lex fori* controls the remedy." See *Law v. Mills*, 18 Penn. St. 185. From the language of the court in the preceding decisions it will be seen that the rule declared is, that the legal *situs* of personal property follows the domicile of the owner, and determines the validity of the assignment, except where the transfer is made by operation of law. Nor do these decisions rest upon the distinction between mere *choses in action* and *corporeal movables*, as claimed in *Guillander v. Howell*, 35 N. Y. 675. But if the for-

sign assignment is repugnant to the legislation of the state where the property is situated it will not be sustained: *Philson v. Barnes*, 50 Penn. St. 230. In this case the assignment was made in Maryland, and included a debt due from a resident of Pennsylvania to the assignor. The debt was attached before the assignee got possession of it. The statute of Pennsylvania required such assignments to be recorded and notice to be given. This was not done. The court held as the assignment contravened the policy of the statute it could not be sustained against an attachment of one of its own citizens. There seems to be no conflict in the cases on this proposition. If a foreign assignment, though valid, in the owner's domicile where made, of either corporeal movables or choses in action, is repugnant to the positive legislation of the state where the property is situated, there is no good reason why it should be sustained, if it is prejudicial to the interests of citizens of the latter state. To uphold it would be to ignore the public policy of the state as evinced by the legislature. Mr. Justice PORTER clearly states the reasons for this rule in the leading case of *Oliver v. Townes*, 2 Mart. N. S. (La.) 93, 102. See, further *Norris v. Mumford*, 4 Mart. O. S. 20; *Durnford v. Brooks*, 3 Id. 222, 225; *Ramsey v. Stevenson*, 5 Id. 23; *Fisk v. Chandler*, 7 Id. 24. Mr. Justice STORY, in referring to this principle, says that no one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or selfish policy. "But how far," continued Judge STORY, "any court of justice ought, upon its own general authority, to impose such a limitation, independently of positive legislation, has

been thought to admit of more serious question, since the doctrine which it unfolds aims a direct blow at the soundness of the policy on which the general rule that personal property has no locality, is itself founded:" Story on Conf. of Laws (8th ed.), § 390. See section 380 of Story on Conflict of Laws, where Lord LOUGHBOROUGH is quoted as saying: "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality; the meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person." See *Freke v. Carbery*, L. R., 16 Eq. 466, where Lord SELBORNE declares that the above passage is simply a translation into English of the maxim *mobilia sequuntur personam*. Lord C. J. ABBOTT's views seem to accord fully with those of Lord LOUGHBOROUGH, as above given, for he says: "Personal property has no locality, and even with respect to that, it is not correct to say that the law of England gives way to the law of a foreign country, but that it is a part of the law of England that personal property should be distributed according to the *jus domicilii*:" *Birchwhistle v. Vardill*, 5 B. & C. 438, 451; s. c. 9 Bligh 32-88; 2 Cl. & F. 571. For further authority on the general proposition, see Story on Conflict of Laws (8th ed.), § 380 *et seq.*, and notes.

But whatever may be urged against the soundness of the exception to the general rule, it has been admitted, in terms, by so many jurists, that its existence as part of the law cannot well be denied. The states adhere to the principle for the purpose of protecting their own citizens; it is never invoked for the benefit of citizens of other states.

And whether the conflict is with a statutory enactment, or contravenes the public policy as reflected by the judiciary, it is not easy to perceive a distinction.

Chief Justice REDFIELD, in *Hanford v. Paine*, 32 Vt. 442, admitted the general rule to be that, if good, according to the laws of the owner's domicile, they will have the effect to pass all the personal property of the assignor wherever situated, "unless their operation is limited or restrained by some local law or policy of the state where the same is situated." See *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487; *Sanderson v. Bradford*, 10 N. H. 260; *Atwood v. Protection Ins. Co.*, 14 Conn. 555.

The Massachusetts courts have, in many instances, repudiated the notion of giving effect to such assignments where they operate against their local legislation, or to defeat attachments made by their own citizens: *Zipcey v. Thompson*, 1 Gray 243; *Carter v. Sibley*, 4 Met. 298; *Edwards v. Mitchell*, 1 Gray 239; *Ingraham v. Geyer*, 13 Mass. 146. This case was followed in *Fox v. Adams*, 5 Greenleaf (Me.) 245; *Means v. Hapgood*, 19 Pick. 107. But Chief Justice SHAW, in giving the opinion in the last case referred to, (*Fox v. Adams*, *supra*), thus: "This case has been repeatedly doubted in this state." See further, *Taylor v. Columbia Ins. Co.*, 14 Allen (Mass.) 353; *Osborn v. Adams*, 18 Pick. 245; *Fall River Iron Works v. Croade*, 15 Id. 11; *Bradford v. Tappan*, 11 Id. 76; *Ward v. Lamson*, 6 Id. 358; *Swan v. Crafts*, 124 Mass. 453; *May v. Wannemacher*, 111 Id. 202. In *Pierce v. O'Brien*, 129 Mass. 314, COLT, J., said: "An assignment made by the debtor himself in another state, which, if made here, would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where made. There is no comity which requires us to give force to

laws of another state which directly conflict with the laws of our own, or to allow to the act of the debtor resident in another state an effect in disposing of his property, as against his creditors here, which it would not have if he lived in Massachusetts." See further, *Andrews v. Herriot*, 4 Cow. 510; *LeRoy v. Crowninshield*, 2 Mason 157; *Bishop v. Holcomb*, 10 Conn. 444; 2 Kent's Com. 407 *et seq.*; *Sill v. Worswick*, 1 Hen. Bl. 693; *Philips v. Hunter*, 2 Id. 405; *Lemmon v. People*, 20 N. Y. 602; *Hoyt v. Thompson*, 19 Id. 226; *People v. Com. of Taxes*, 23 Id. 224; *Ederly v. Bush*, 81 Id. 199, 206.

Freen v. Van Buskirk, 7 Wall. (74 U. S.) 139, is an interesting case. The facts were: A citizen of New York being indebted to B., a citizen of the same state, mortgaged certain personal chattels which he had in Illinois to B. Two days after, and before the mortgage could be recorded in Illinois, or the property delivered, both being necessary by the law of Illinois (though not by the laws of New York), to the validity of the mortgage, C., to whom A. was also indebted, and who was also a citizen of New York, attached the property which A. had mortgaged to B. in the state of Illinois. B. then brought suit in New York against C. for converting the chattel. C. pleaded in bar the proceedings in attachment in Illinois. The New York courts held that the question whether B. had property in the chattels on the day of attachment was to be determined by the law of the domicile of the parties, and as by the New York laws B. took title to the property the moment the mortgage was executed, the attachment in Illinois was not a bar. The United States Supreme Court reversed this decision, and held that the laws of Illinois governed as to B.'s property in the chattels on the day of the attachment. This case is reaffirmed in *Hervey v. R. I. Locomotive Works*, 93 U. S. (3 Otto) 664; see *Clark v. Tar-*

bell, 58 N. H. 88; *Danner v. Brewer*, 69 Ala. 191.

In *Varnum v. Camp*, 1 Green (N. J.) 326, it was held that a general assignment, made in a foreign jurisdiction by a debtor in favor of his creditors, was not valid so as to pass title to the personal effects of the debtor situated within the state of New Jersey as against the creditors of the assignor, if it contravened the essential provisions of the statute of New Jersey regulating such assignments. The fact that the transfer was valid by the laws of debtor's domicile would not render effectual property subject to New Jersey laws. This case was affirmed in *Moore v. Bonnell*, 31 N. J. L. (2 Vroom) 90, 94. In *Bentley v. Whittemore*, 19 N. J. Eq. 462, the Chief Justice, in commenting on *Varnum v. Camp*, *supra*, said: "The ground of decision in that case was, that we had established in this state a local policy under which our citizens had a right to be protected. It was admitted that, as a general rule, a transfer of property valid where made, would be effectual everywhere; but it was also deemed equally clear that the recognised exception to the rule was that it was not to be enforced to the manifest injury of our own citizens. A state cannot be required, thus it was argued, by any of the obligations of comity, to give up its own system, and substitute in lieu of its any part of the social arrangement of a foreign jurisdiction. This limitation, as well as the rule itself, is firmly established as a part of our international law."

Mr. Justice CORBIN, in *Andrews v. Herriot*, 4 Cow. (N. Y.) 510, admitted the general rule to be that the *lex loci contractus* governed, but "with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interests or convenience of such state or citizens."

In *Bryce v. Brisbin*, 26 Mo. 423, the assignment was made in Minnesota, and

made preferences, and was valid by Minnesota laws, but such preferences were invalid by laws of Missouri. It was held that this assignment would not operate against an attaching resident creditor of the assignor in the Missouri courts. The court said: "We are asked to enforce an assignment, which could not be made and enforced if made in this state, as it must and will be by the laws of Minnesota, in opposition to the claims of a creditor resident here, who has attached the property previous to any notice of assignment. It is not understood that comity requires a court to enforce a contract valid according to the laws of the place where the contract is made, if such enforcement would be attended with manifest injustice to the claims of the citizens of the county where the property is located and where the claim is asserted. Justice must not be sacrificed to courtesy. It is very obvious that if we hold the assignment to prevail over the attachment, we make a discrimination against our own citizens. * * * There is no principle of comity which requires us to go this far." See *Brown v. Knox*, 6 Mo. 302, 306; *Johnson v. Parker*, 4 Bush (Ky.) 149.

Mr. Justice DAVIS, in *Green v. Van Buskirk*, 38 How. Pr. 60, truly stated the doctrine of the weight of authority, when he said that there is no absolute right to have such transfers respected, that it is only on principles of comity that it is allowed; "and this principle of comity," remarked he, "always yields when the laws and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives."

In referring to Judge STORY's statement that personal property is governed by the law of domicile, SARGENT, J., in *Dunlap v. Rogers*, 47 N. H. 287, observed: "But whatever weight the English or early New York authorities might otherwise have been entitled to,

the great weight of American authority is now the other way; and it may be considered as part of the settled jurisprudence of this country, that personal property, *as against creditors*, has locality, and the *lex loci rei sita* prevails over the law of the domicile with regard to the rule of preferences in the case of insolvent estates. The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other states it is upon principles of comity, and only when neither the state nor its citizens would suffer any inconvenience from the application of the foreign law."

Distinction between Debts and Movables.—There has been a distinction taken in some cases as to the *situs* between debts and movables—the latter being capable of having a *situs* not the former—as they follow the domicile of the owner: *People v. Com. of Texas*, 23 N. Y. 224. Mr. Justice PECKHAM, in *Guillander v. Howell*, 35 N. Y. 657, said *Speed v. May*, *supra*, and *Caskie v. Webster*, *supra*, were sound law, because of this distinction. But, as above observed, neither of those cases were put upon this distinction, but upon the simple principle that a voluntary assignment of movables, valid where made, is valid everywhere. Yet in both those cases the items in controversy were debts. Mr. Justice PECKHAM, in the case *supra*, in speaking of this distinction, said: "A chose in action cannot be surely said to have any actual *situs* in the place where the debtor resides. As a general principle it is payable at the residence of the creditor if not otherwise expressed, and a tender to be good must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's state to legislate exclusively as to the legality of the transfer of that debt made by a foreign creditor. In such cases, as in all others where the property transferred does not actually lie within the jurisdiction of another gov-

ernment, a sale or a contract valid where made is valid everywhere."

And in speaking of another Maryland case, Mr. Justice PECKHAM said: "The Supreme Court in the third district, at general term, in *Thurman v. Stockwell*, lately held, that the exception did not extend to a debt due from a resident in Connecticut to a resident of this state, but that an assignment thereof valid here, though invalid there by her laws, ought to be valid there also, even as against residents of Connecticut, because a debt is not a *corpus* capable of local position, but merely a *jus incorporeal*."

In *Howard Nat. Bank v. King*, 10 Abb. (N. Y.) N. Cases 346, the New York Supreme Court, in referring to this question said: "The rule in regard to personal property that it has no *situs*, but that it follows the person of the owner, is elementary. As a corollary from that rule, it follows that personal property is governed in its transfer and disposition by the law of the domicile of its owner, that is, by the law of the place where the sale is made, so that if a sale or other transfer be valid where made, it is valid everywhere." After admitting the exception that the transfer is invalid in another state in which the property is actually situated, if it conflicts with the laws of that state, and pronouncing it logically inconsistent with the above rule and corollary, the court continued: "From an examination of the authorities in the light of the rule, I am of opinion that the exception affects only movable property, and does not operate upon credits or other choses in action held by the person who makes the assignment or transfer, and that in so far as they are concerned, they are governed by the general rules above mentioned, and that they have no *situs* apart from the domicile of their owner, and if a transfer of them be made in the state in which the owner is domiciled, which is valid there, it is effectual everywhere."

But in *Pilson v. Barnes*, 50 Penn. St. 230, it was expressly held that a debt had a *situs*, inasmuch as a foreign assignment could not transfer it in the domicile of the debtor if it contravenes some positive legislative enactment. See, also, *Paine v. Lester*, 44 Conn. 196. But see *Noble v. Smith*, 6 R. I. 446; *Mowry v. Crocker*, 6 Wis. 326; *Smith v. Ch. & N. W. Railroad Co.*, 23 Id. 267; *Fuller v. Steiglitz*, 27 Ohio St. 355.

Question between Foreign Parties.—It has been repeatedly held, by an almost unbroken line of authorities, that where the question of extra-territorial property arises between a foreign assignee and a foreign creditor, the laws where the assignment was made will determine its validity: *Van Buskirk v. Warren*, 39 N. Y. 119; *Abraham v. Plestoro*, 3 Wend. 540; *Plestoro v. Abraham*, 1 Paige 236; *May v. Wannemacher*, 111 Mass. 202; *Whipple v. Thayer*, 16 Pick. 25; *Kidder v. Tufts*, 48 N. H. 125; *Hall v. Boardman*, 14 Id. 38; *Dunlap v. Rogers*, 47 Id. 287; *Smith v. Brown*, 43 Id. 44; *Richardson v. Forepaugh*, 7 Gray 546; *R. I. Bank v. Dunforth*, 14 Id. 123; *Bank of U. S. v. Lee*, 13 Peters 107; s. c. 5 Cranch C. C. 319; *Crapo v. Kelly*, 16 Wall. 610; *Pond v. Cooke*, 45 Conn. 132; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Burlock v. Taylor*, 16 Pick. (Mass.) 335.

In *Einer v. Beste*, 32 Mo. 240, the parties were all citizens of Louisiana. The assignment was made in that state and good there. It operated upon all of the debtor's property, some of which was in Missouri. One of the creditors of the assignor, resident of Louisiana, attached property in Missouri. It was held that the assignee's right to the property would prevail over the non-resident attaching creditor.

Thurston v. Rosenfield, 42 Mo. 474, affirms the principle of this last case. In that case the parties were all residents of New York and New Jersey. The

debtor made a voluntary assignment of his effects in New York for the benefit of his creditors, in which certain of them were preferred. The assignment included certain real estate situated in Missouri. It was valid by New York laws, but would have been void if made in Missouri. The plaintiff attached the debtor's Missouri property. It was held that the attachment suit could not be maintained. The court affirmed the general principle that a foreign assignment, made directly in opposition to their legislation, should never have the effect of giving an advantage to non-resident creditors to the injury of their own citizens. "But," said the court, "as this case presents no such question, we think comity requires and justice will be subserved by holding the assignment good according to the laws of the place where executed. See *First National Bank v. Hughes*, 10 Mo. App. 7, 22, where it was held that a deed of assignment of land, void where made, but valid by laws of Missouri, would effectually pass title to land in Missouri, against an attachment upon such land at the suit of a citizen of a third state. See *State Bank Receiver v. Plainfield Bank*, 34 N. J. Eq. 450.

In *Bently v. Whittemore*, 19 N. J. Eq. 432, the assignment was made in New York between New York parties and good there. It was sought to be attacked in the courts of New Jersey, in so far as it operated upon property within that state, by a non-resident, because it was invalid by New Jersey laws. Mr. Justice BEARDSLY, in giving the opinion, said: "Upon what principle can a citizen of another state ask us to refuse to recognise the validity of an assignment made in the state of New York and in conformity to her laws? Upon what plea consistent with comity, under such circumstances, are the authorities of this government to repudiate a transaction valid by the laws of a sister state? If the question touched one of our own citizens, we could vindicate our rejection of such transaction on

the ground of our statute, passed legitimately, for the special regulation of the affairs of such citizen. But if such a rejection relates to the citizens of another state, how is such a line of conduct to be justified? We might, indeed, urge, as a sort of excuse, that the laws of New York regulating assignments were not similar to the laws of this state, and that we preferred the regulations of our law. * * * But I cannot think we have a right to endeavor to arbitrate in such a concern. * * * The true rule of law and public policy is this: "That a voluntary assignment made abroad, inconsistent in substantial respects with our statutes, should not be put in execution here to the detriment of our own citizens, but that, for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." So, in *Whipple v. Thayer*, 16 Pick. 25, this rule is well illustrated. The parties were all citizens of Rhode Island, where the deed of assignment was made and operated to convey property in Massachusetts. It conformed to Rhode Island laws, but not with the laws of Massachusetts. A Rhode Island citizen attached a portion of the property in Massachusetts. The title of the assignee was held to prevail. *Burlock v. Taylor*, 16 Pick. 335, and *Daniels v. Willard*, Id. 36, hold likewise.

In *Atwood v. Protection Ins. Co.*, 14 Conn. 555, the subject of controversy was a debt due from a company in Connecticut to a citizen of Ohio. The assignment, made in Ohio and good there, transferred this debt to the assignee, also a citizen of Ohio, but it did not conform to Connecticut laws. A Pennsylvania citizen attached this debt in Connecticut. It was held that the assignment effectually passed the debt. See further, *Richardson v. Leavitt*, 1 La. Ann. 430. *Bholen v. Cleveland*, 5 Mason 174, is an instructive case on this subject. The courts of New Hampshire have announced this rule: *Sander-son v. Bradford*, 10 N. H. 260.

But *Paine v. Lester*, 44 Conn. 196, does not seem to harmonize with the above cases. The case makes no distinction between citizens of Connecticut and citizens of sister states. The facts were: A corporation of Pennsylvania made an assignment for the benefit of its creditors in that state, and which was valid there. One item included a debt due from a citizen of Connecticut. The transfer was not good by laws of Connecticut. After assignment a citizen of Rhode Island attached the debt in Connecticut. The attachment was held to prevail. In this case it was said (p. 204): "The citizens of all our sister states have, by the Constitution of the United States, the same privileges with our own citizens, and any one of them who has availed himself of the legal remedies furnished by our laws, to secure payment of a debt due him, has the same claim to the assistance of our courts that one of our own citizens would have." But the doctrine of this case is exceptional.

In *Rhode Island Bank v. Danforth*, 14 Gray (Mass.) 123, the Massachusetts Supreme Court said: "An execution has sometimes been made in favor of creditors residing in Massachusetts, and who had made attachments here which were sought to be avoided by an assignment or transfer in another state to secure creditors. But this is not the case here; all the parties are citizens of Rhode Island, and a valid mortgage there may transfer the property in Massachusetts."

Actual Change of Possession.—If there is an actual change of possession, the transfer is good everywhere, yet it has been held by some cases, that this change must conform to the laws of the place where the property is situated: *Koster v. Merritt*, 32 Conn. 246; *Mead v. Dayton*, 28 Id. 33; *Chafee v. Fourth National Bank*, 71 Me. 514; *Forbes v. Scannell*, 13 Cal. 241; *Philson v. Barnes*, 50 Pa. St. 230; *Hanford v. Paine*, 32 Vt. 442;

Rice v. Curtis, 32 Vt. 460, 464. Thus, in the last case, the assignment was made in New York and valid, but not in conformity to the laws of Vermont, where the property was situated. The assignee took actual possession. It was held the title of the assignee was not effectual. And in *Philson v. Barnes*, 50 Pa. St. 230, the assignment contract was made in Maryland, and operated on property in Pennsylvania. It was valid in Maryland, but not in conformity with the laws of Pennsylvania, because not recorded in the county where the property was located. The property was attached by a Pennsylvania citizen, and his title was sustained. But in *Ockerman v. Cross*, 54 N. Y. 29, a different rule was laid down. The assignment was executed in Canada, and valid there, but not in compliance with the laws of New York, because not "prepared, acknowledged and recorded." The assignee got possession of the property. It was held that the assignee's title to the property was complete. And a like ruling is made by the Supreme Court of California, in *Forbes v. Scannell*, 13 Cal. 242. The property was located in California, and owned by citizens of the United States residing and doing business in Canton, China. The assignment was executed in China, but was not good by the laws of California. The assignee took actual possession, and his title was held good. BALDWIN, J., in giving the opinion, said (p. 277): "The truth is, we do not consider this question as one of comity at all. It is a pure question of property. By our general laws we recognise the duty of government to protect property, and that is, property which is acquired by contract, lawful and effectual to pass title in the place where it is made. It might as well be said, that if a man made his money by usury in California, and carried it into Pennsylvania, the courts of that state would refuse to recognise his right, because usury is against the policy of Pennsylvania. Or if won at cards, in

Mexico, where no law exists against gaming, it would cease to be his property whenever brought into this state."

Transfer Valid by Lex loci Contractus and Lex fori.—If the assignment is good by the laws of the state of the assignor's domicile where the assignment is made, and also valid where the property is situated, it will be upheld as against an attaching creditor in the courts of the latter state. *Miller v. Kernaghan*, 56 Ga. 155. In answer to the contention that the domestic tribunals will hold assets against foreign assignment, the court said: "Certainly this would be done if the assignment were not conformable to our own laws, but there would be no inconsistency in recognising the assignment as perfectly valid here, and then refusing to yield to it. There may be decisions in other states or countries on that erratic line, but we are sure sound principle is the other way, and so we believe is the weight of authority. * * * An assignment, whether foreign or domestic, that presents no conflict with any law, is to have full effect on all assets to which its terms apply." This case fully accords with the principal case. And it was held, in *Ockerman v. Cross*, 54 N. Y. 29, that such an assignment, not invalidated by any law of New York, would pass title of personal property of the debtor, situated in that state, to the assignee. To same effect, see *Walker v. Whitlock*, 9 Fla. 87, 103. After reviewing the authorities, the court said: "This assignment being a *voluntary* one, by deed, formal and irrevocable, containing no provisions repugnant to our laws, nor to the policy and positive institutions of this state, and there being nothing to prohibit the assignors, who are citizens of other states, from a free disposal of their personal property situated here, we must, upon the principles of comity between sister states, hold the assignment valid here, and that it operated at its execution to vest the title in the assignee and divested all the interest of the as-

signor, unless void for want of delivery of the chose of action assigned to the assignee."

In *Gregg v. Sloan*, 76 Va. 497, debtors of North Carolina conveyed their property in trust to secure the payment of their debts, including a debt due them from a citizen of Virginia. The deed was properly recorded in North Carolina, but before it was recorded in Virginia, a Virginia citizen attached the debt, and the land securing it. It was held that the assignee had the prior title. See *Richardson v. Rogers*, 45 Mich. 591.

The recent case of *Atherton v. Ives*, 20 Fed. Rep. 894, fully sustains this principle. In that case the deed of assignment was legally executed in New York, by residents of that state, and included personal property in the state of Kentucky. After the assignment was made, this property was attached by a citizen of Kentucky. It was insisted that the assign-

ment should not be sustained against a resident attaching creditor, because it was invalid by the laws of Kentucky, inasmuch as it gave preferences, and that whether invalid or not, comity did not require that it should be sustained against a citizen of Kentucky. The assignee's title was held to prevail over that of the attaching creditor, and it was held that the assignment was not invalid by Kentucky's laws because of preferences, and would have been valid if it had been made in Kentucky, and that comity required that assignments made in other states should be respected, unless contrary to some positive law of Kentucky. The court was also of the opinion that no distinction should be taken between "home creditors" and non-resident ones, unless compelled by legislative will, clearly expressed.

EUGENE McQUILLIN.

St. Louis, Mo.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ARKANSAS.²

SUPREME COURT OF ILLINOIS.³

COURT OF CHANCERY OF NEW JERSEY.⁴

SUPREME COURT OF RHODE ISLAND.⁵

ACTION.

Damages to Adjacent Property Owners from Public Improvement in a Street—Liability therefor, upon whom it Rests—Contribution of Railroad Company to Cost.—The mere contributing of material aid by a private individual to a city, to enable the latter to execute a public work not unlawful in itself, is not necessarily attended with liability on the part of him who extends such aid, for injury that may thereby

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 114 U. S. Rep.

² From B. D. Turner, Esq., Reporter; to appear in 44 Ark. Rep.

³ From Hon. N. L. Freeman, Reporter; to appear in 111 Ill. Rep.

⁴ From Hon. John H. Stewart, Reporter; to appear in 39 N. J. Eq. Rep.

⁵ From Arnold Green, Esq., Reporter; to appear in 14 R. I. Rep.

result to private rights: *Culbertson and Blair Packing and Provision Co. v. City of Chicago*, 111 Ill.

So, where a railway company entered into a contract with a city, by which the former agreed to pay a given sum on the cost of a viaduct proposed to be constructed in a street, there being no illegal motive in tendering such aid to the city, it was *held*, that the railway company could not be held jointly liable with the city in tort for a private injury to adjoining property caused by the viaduct: *Id.*

A city alone has authority to construct a viaduct in a street, and when one is so constructed by the city, even when done under the joint superintendence of a public official of the city and a chief engineer of a railroad company, and the company paid a part of the price of the improvement, it was *held*, that the viaduct was still public property belonging to the city alone. The aid furnished by the railway, in such case, may be treated as a mere private donation: *Id.*

ARBITRATION.

Submission to Two Arbitrators and Disagreement—Necessity of a New Hearing on Selection of a Third Arbitrator.—Where a controversy is submitted to two arbitrators, under an agreement for the selection of a third one in case the two are unable to agree, and after a hearing and disagreement the two first appointed select a third man, an award made by two of them, without giving the party against whom it is rendered an opportunity of being heard, is void, and no recovery can be had upon it: *Alexander v. Cunningham*, 111 Ill.

Award—Extent of—Items not considered.—An award cannot be extended beyond the things submitted; and even if the language of the submission be broad enough to cover a claim subsequently sought to be enforced, yet, if it be clearly made to appear that the claim was not before the arbitrators, and was not passed upon by them, the award will not bar it: *Exec. of Lee v. Admr. of Dolan*, 39 N. J. Eq.

ASSIGNMENT.

Unrecorded Mortgage—Validity against Assignee.—A. executed a mortgage to B. of certain personalty. The mortgage was made and received in good faith. The mortgagee never recorded the mortgage nor took possession of the property, but there was no collusion between the parties nor design to give the mortgagor a fictitious credit. A. subsequently made an assignment "of all his estate and property" for the benefit of his creditors; on a bill of interpleader brought by the assignee: *Held*, that the mortgagee was entitled to the proceeds of the mortgaged property: *Held, further*, that the creditors were entitled only under the assignment, and that the assignee succeeded only to the rights of the assignor: *Held, further*, that Pub. Stat. R. I., cap. 176, § 9, which provides that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," must be construed in accordance with the above holding: *Wilson v. Esten*, 14 R. I.

ATTORNEY.

Contract for Conditional Fee.—Under the statute authorizing the assignment of counsel to indigent suitors, the complainant was assigned to assist the defendant in a suit to recover from a life insurance company the amount of a policy on her husband's life. The complainant thereupon made an agreement with her to prosecute the claim, and, if successful, to receive one-half of the amount recovered, and if not successful, to receive nothing. He did prosecute the suit, paid the costs incurred, and recovered the amount of the policy, \$1000, besides \$339.27 interest thereon: *Held*, that he was entitled to one-half of this whole amount: *Hassell v. Van Houten*, 39 N. J. Eq.

BANKRUPTCY. See *Debtor and Creditor*.

CONSTITUTIONAL LAW.

Commerce between the States—Tax on.—The state of Pennsylvania having attempted to collect a tax on the capital stock of a New Jersey corporation, running a ferry between the two states, on the river Delaware, on the ground that the corporation was doing business in Pennsylvania, *Held*, that such tax was illegal and void as an attempted exaction upon inter-state commerce: *Gloucester Ferry Co. v. Pennsylvania*, S. C. U. S., Oct. Term 1884.

Sidewalk—Removal of Ice and Snow—Public Burden laid on Citizen—Police Power.—A city has not the constitutional power to require the owner or occupant of premises to keep the sidewalk and gutters in front thereof free from snow and ice, or to sprinkle the same with ashes or sand where the snow and ice cannot be removed without injury to the pavement, and inflict a fine on him for a neglect or failure to do so. The ruling in *Girdley v. City of Bloomington*, 88 Ill. 554, adhered to: *City of Chicago v. O'Brien*, 111 Ill.

A sidewalk in a city, though devoted to the use of pedestrians, is nevertheless a portion of a public highway, as much so as the street. They are both free to be properly used and enjoyed by the entire public, and are constructed alike for their use: *Id.*

The police power of a state, comprehensive as it is, has its limitations. It cannot be held to sanction the taking of private property for public use without just compensation, however essential it may be for the public health, safety, &c. Upon the like principle, a purely public burden cannot be laid upon a private individual except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation: *Id.*

Statute compelling Owners of Dams to place Fishways therein.—The legislature may impose a duty on owners of dams to place therein suitable fishways, in order that the free passage of fish may not be obstructed. And the owner of the dam cannot by occupancy or user for any length of time, acquire a prescriptive right as against the public, so as to prevent the enforcement of the provisions of the statute against him: *Parker v. The People*, 111 Ill.

Sidewalks—Ordinance requiring Owner to keep in Repair.—A city cannot, by ordinance, prescribe a fine or penalty to be imposed on the owner or occupant of a lot for a failure to repair the sidewalk in front.

of the same. Keeping sidewalks in repair is referable to the same power as for constructing new improvements, and cannot be required to be done by the abutting owner or occupant, at his own expense, either by the exercise of the police power, or by fines and penalties prescribed by ordinance, or by direct legislative action: *City of Chicago v. Crosby*, 111 Ill.

CONTRACT. See Sunday.

Subject to Approval—Failure to Approve.—A statute provided that the Board of Public Works in the city of Providence might hire such employees as it deemed needful, "and agree with them for their compensation, provided, however, that when such compensation shall exceed the sum of \$1000 per annum, such compensation shall be subject to the approval of the city council * * * which said compensation shall be paid out of the city treasury:" Of the employees so hired, the city council approved the compensation of all except two, who were hired at more than \$1000 per annum, and in regard to whom the council took no action: *Held*, that these two were entitled to the pay agreed on with the Board of Public Works: *Held, further*, that the city council could disapprove the compensation agreed on by the Board of Public Works or approve it with a reduction in amount, but could not, by mere non-action, defeat the agreement made by the board: *Mathewson v. Tripp*, 14 R. I.

By Letter or Telegraph—When completed.—A contract by letter is completed the instant the letter accepting the offer is mailed, and is valid and binding whether the letter of acceptance is received or not. But where anything else is left to be settled in respect to an offer by mail or telegraph, the acceptance of the offer by telegraphing will not complete the contract where the dispatch does not reach its destination: *Haas v. Myers*, 111 Ill.

A. and B. contemplated making a large purchase of cattle in the West, and it was agreed that A. should go to see the cattle, and telegraph back to B. the price per head if a purchase was made, when B. was to reply by telegraph, without delay, saying "yes," if he was willing to take a third interest in the purchase, and then A. was to telegraph back to B. the estimated amount required to pay a third interest, which B. was to place to the credit of A. and his brother, in a Chicago bank, so that the latter might draw on the same, and cause the bank to telegraph that fact to A. A. bought the cattle for \$55,000, and telegraphed B. the price per head, and he answered "yes," which dispatch never reached A. Later, B. sent another dispatch to A., saying if the cattle were good there was no danger in buying them, which was received on the same day that A. and another had concluded the purchase by paying the necessary advance. On the next day B. arrived, and offered to pay his share of the price, which was declined: *Held*, that under the circumstances the sending of the first dispatch accepting a share in the purchase, which never reached its destination, did not complete the contract and make A. and B. partners in the purchase, there being something else to be done besides a mere acceptance, to carry out the contract, and also that B.'s offer to pay on the day after the purchase, and payment of the price, was too late: *Id.*

CRIMINAL LAW.

Larceny—Possession of Property—Evidence.—Possession of stolen property is a fact from which the possessor's complicity in the larceny may be inferred; but possession alone is not sufficient to sustain a conviction. It must appear that the property was recently stolen; the possession must be unexplained, and in some form involve an assertion of property in the possessor: *Shepherd v. The State*, 44 Ark.

DEBTOR AND CREDITOR. See *Assignment*; *Payment*.

Holding of Legal Title—Right of Creditor obtaining Judgment for Tort—Estoppel.—The complainant recovered a judgment at law against the defendant's brother for false imprisonment, and afterwards filed a creditor's bill to set aside, as fraudulent, two conveyances of land by the brother to the defendant. The evidence showed satisfactorily that the lands in question, in fact belonged to the defendant, although the legal title thereto had been in the name of his brother: *Held*, that, as the cause of the action at law had been a tort, there was, against the defendant, no ground of estoppel such as sometimes exists where the cause of action is founded on a contract, and the credit has been given under the belief that the debtor was the true owner of the property, of which he had the legal title only, but not the equitable title: *Lillis v. Gallagher*, 39 N. J. Eq.

Fraudulent Conveyance—Subsequent Bankruptcy—Exclusive right of Assignee.—The right to recover property conveyed in fraud of creditors by a debtor subsequently adjudicated a bankrupt, is vested in his assignee alone, and the failure of his assignee to bring an action to recover the property within the time limited by the bankrupt law, does not transfer the right to bring such action to the creditors of the bankrupt: *Exrs. of McCartin v. Perry*, 39 N. J. Eq.

Fraudulent Conveyance—Right of Execution Purchaser to Avoid.—A purchaser of real estate at an execution sale may in equity avoid conveyances previously made by the judgment-debtor in fraud of his creditors: *Belcher v. Arnold*, 14 R. I.

DEED. See *Gift*.

DURESS

Fear of Prosecution of Son.—When a son had been guilty of embezzlement and his mother made a note and executed a mortgage to the employer from whom he had embezzled, and the court was satisfied that the mother's controlling motive was to protect her son from exposure and prosecution: *Held*, that she was not a free agent and that the note and mortgage should be annulled and cancelled: *Foley v. Greene*, 14 R. I.

The maxim *In pari delicto potior est conditio defendentis*, does not apply to such a case: *Id.*

EJECTMENT. See *Municipal Corporation*.

EQUITY. See *Notice*; *Specific Performance*.

Policy of Insurance—Reformation after Loss—Mistake.—A policy of insurance issued in the name of the agent of the owner of the vessel

insured, instead of in the name of the principal, through the mistake of the insurance company's agent in preparing the application for the policy, without any representation or mistake of the owner or applicant for such insurance, may be rectified after the loss of the vessel, the act of the company's agent in such case being that of the company and not of the insured, notwithstanding the fact that he signed the application with his own name "for applicant:" *Hill v. Millville Mut. Mar. and Fire Ins. Co.*, 39 N. J. Eq.

Ne exeat—*Holding of Defendant in Custody*.—Statements by a defendant who was subsequently arrested on a *ne exeat*, made to complainant's lawyer, that if suits should be begun against him, and he should be likely to get the worst of it, or if any order should be made against him by any court, his (defendant's) lawyer would find it out beforehand and would let him know, so that he could and would leave the state before they could do anything with him, accompanied by other statements, that complainant and her father were both poor, and that he would law them both to death, if they attempted any suits against him, and that he had put all his property out of his hands, but still had the benefit of it, are sufficient, on an application for his discharge, to hold him in custody under the *ne exeat*: *Cary v. Cary*, 39 N. J. Eq.

Practice—*Decree Pro Confesso*—*Delay in Application for Re-issue of Patent cannot be set up after such Decree*.—By the practice of the United States Supreme Court, a decree *pro confesso* is not a decree as, of course, according to the prayer of the bill, nor merely such as the complainant chooses to make it; but it is made (or should be) by the court, according to what is proper to be decreed upon the statements of the bill assumed to be true: *Thomson v. Wooster*, S. C. U. S., Oct. Term 1884.

After the entry of such a decree and while it stands unrevoked, the defendants are barred from alleging anything in derogation of it; or from questioning its correctness on appeal, unless on the face of the bill it appears manifest that it was erroneously and improperly granted: *Id.*

Although a delay of fourteen years in the application for the re-issue of a patent is strongly presumed to be unreasonable, yet the court cannot say, as a matter of law, that it is not susceptible of explanation; and this defence cannot be set up after a decree *pro confesso*: *Id.*

ERRORS AND APPEALS.

What is a Final Judgment.—The judgment of the state Supreme Court was, that the judgment of the state District Court "be, and the same is hereby reversed with costs, with directions to the Superior Court of Los Angeles county to enter judgment upon the findings for plaintiff, as prayed for in his complaint:" *Held*, to be final for the purpose of a writ of error to the Supreme Court of the United States: *Mower v. Fletcher*, S. C. U. S., Oct. Term 1884.

EVIDENCE. See *Criminal Law*.

FRAUD. See *Husband and Wife*.

FRAUDS, STATUTE OF.

Tenants in Common—Contracts.—The doctrine of part performance to take a parol contract for the sale of land out of the operation of the Statute of Frauds, does not apply to contracts between tenants in common for the sale of one tenant's interest to the other. Each tenant is already in possession, and one cannot assume exclusive possession under and in pursuance of the contract. Their contracts with each other must be in writing duly signed: *Huines v. McGlone*, 44 Ark.

Where one tenant in common by parol contract sells his moiety of the land to his co-tenant, and afterwards repudiates the contract and conveys his interest to another purchaser with notice of the facts, the latter cannot recover it in equity from the co-tenant purchaser except upon return to him of his purchase-money and half of all taxes and cost of improvements paid by him, and interest from the time of their payment: *Id.*

GIFT.

Donatio causa mortis—Essentials.—To establish a gift *causa mortis*, the evidence must show not only that the person *in extremis* designated with proper distinctness the thing given and the donee, but it must also show that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery: *Newton v. Snyder*, 44 Ark.

Delivery to a third person for a donee, is as effective as delivery to the donee; but delivery to an agent as agent for the giver to perform the act or make delivery only after the giver's death, would amount to nothing: *Id.*

Delivery of Deed—Distinction between a Deed and a Will—Voluntary Settlement.—A testamentary disposition of property is ambulatory until the death of the testator, when it takes effect; but a deed for an interest in land must take effect upon its execution or not at all. A party cannot make a deed for land and retain its custody, and have it operate as a conveyance only after his death. It takes effect at once or not at all: *Cline v. Jones*, 111 Ill.

A conveyance of land or a deed may be good as a voluntary settlement, however, though it be retained by the grantor in his possession until his death, when the circumstances, aside from the retention of the deed, do not show the grantor did not intend it to operate immediately: *Id.*

A father having previously made gifts of property to all of his children except a daughter, went before a justice of the peace and executed a deed of conveyance of a tract of land to her, and acknowledged the same, stating that it would make all his children equal; but he retained the deed in his possession, with no present intention it should take immediate effect, but to be operative only at his death, or on the daughter moving upon and occupying the property, which she never did. It was held, after his death, that the deed never took effect, and that the land therein described passed to his heirs, generally: *Id.*

HUSBAND AND WIFE. See Insurance.

Contract between—Fraud.—The legislation of this state, enlarging the capacity of a married woman to acquire and dispose of property,

does not give her capacity to make a legal contract with her husband: *Executor of Farmer v. Farmer et al.*, 39 N. J. Eq.

A wife may bestow her property, by gift, on her husband, or she may make a contract with him which will be upheld in equity, but the courts always examine such transactions with an anxious watchfulness and dread of undue influence: *Id.*

Where a contract is made by parties holding confidential relations, so that it is probable that they did not deal on terms of equality, but that unfair advantage might have been taken by the stronger party of the weaker, there the burden, if the contract is assailed, rests on the stronger party to show that no advantage was taken, otherwise fraud will be presumed: *Id.*

INFANT.

Avoidance of Deed—Covenants—Subsequent Quit-claim Deed.—A deed executed by an infant may be avoided by him after maturity, by any act unequivocally manifesting an intention to avoid it; and a reconveyance to another not in privity with the first grantee, is conclusive evidence of such intention, and disaffirms the first deed; and this, whether the last be a quit-claim deed or a deed with covenants of warranty: *Bagley v. Fletcher*, 44 Ark.

The deed of an infant will pass his estate subject to disaffirmance after his maturity, but the covenants in his deed are absolutely void: *Id.*

INSURANCE. See *Equity*.

Policy in favor of Wife—Subsequent Petition for Divorce.—A. took out policy on his wife's life, payable in four years to her if living and if not living to himself. He paid the premiums, retained the policy and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce. A statute provided, "Any policy or policies of insurance or part thereof which shall not exceed in the aggregate to the sum of ten thousand dollars, made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall enure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person." *Held*, that the wife was entitled to the amount due on the policy at its maturity: *Aetna Life Ins. Co. v. Mason*, 14 R. I.

LIMITATIONS, STATUTE OF.

Equity—Analogy to Law.—A. transferred to B. certain corporate stock, vesting the legal title in B., who held it as a chattel mortgage. After default by A. in the conditions of the mortgage, and after B. had subsequent to such default held and treated the stock as his own for more than six years, A. filed a bill in equity to redeem. *Held*, that the bill could not be sustained: *Greene v. Dispeau*, 14 R. I.

LIS PENDENS. See *Notice*.

MALICIOUS PROSECUTION.

Probable Cause—Judicial Finding—In an action for malicious prosecution brought by A. against B.: *Held*, that a judicial finding in the former action in favor of B., and against A., by the court of original jurisdiction, is conclusive of probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal: *Welch v. Boston & Providence Railroad*, 14 R. I.

MANDAMUS.

For what it may not issue to Inferior Court.—A mandamus will not issue to an inferior court to compel it to conform its judgment to the finding in the case, when a motion to amend the judgment in that particular has been entertained by the court and the amendment refused because the court was of opinion that the judgment had been correctly recorded: *Ex parte Morgan*, S. C. U. S., October Term 1884.

MASTER AND SERVANT. See *Contract*.

MINES AND MINING.

Sale of an Interest in a Mining Partnership.—One member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and such a sale does not dissolve the partnership or injure any right or property of the other associates: *Bissell v. Foss*, S. C. U. S., October Term 1884.

MORTGAGE. See *Assignment*.

MUNICIPAL CORPORATION. See *Action*; *Constitutional Law*; *Contract*.

Acquiring Real Estate by Possession—Ejectment.—A municipal corporation may acquire realty by possession and for other than municipal purposes: *New Shoreham v. Ball*, 14 R. I.

In ejectment wherein the plaintiff's title rested on possession for more than twenty years, the *locus* was a long, sandy waste along the seashore, and the defendants were mere intruders. The plaintiff, a municipal corporation, had by vote let the *locus* year by year from 1829 to 1875. The court instructed the jury that to show title the town must prove open, adverse, actual and exclusive possession for twenty continuous years, and "that the votes, though they were evidence of a claim of right on the part of the town, were not sufficient to prove title by possession unless the lessees took actual possession under them, that it was not necessary for the plaintiff town to show that the possession of its lessees was continuous in the sense of their being on the premises all the time, and that if the lessees were in possession of any part of said East Beach (the *locus*), under the votes it might be considered that they were in possession of the whole for the purpose of acquiring title by possession by the town." *Held*, that the instruction under the circumstances contained no error entitling the defendants to a new trial. *Held*, further, that passage over the *locus* by the inhabitants of the town to get seaweed or sand, or use of the *locus* for temporary deposit of seaweed, would not amount to an interruption of the possession: *Id.*

There being evidence to show that the *locus* was known as the East Beach, *Held*, that it was for the jury to determine whether or not the town let the *locus* by the name of the East Beach : *Id.*

NOTICE.

Bona fide Purchase—Lis pendens—Consideration.—To subject a purchaser to the notice of *lis pendens*, in the absence of actual notice, the purchase must be made from one who was a party to the suit at the time : *Marchbanks v. Banks*, 44 Ark.

A purchaser, though without notice of outstanding equities, is not an innocent purchaser unless he has paid the whole consideration. Payment of part and securing the residue to be paid, are not sufficient. But he has an equity to reclaim out of the property the part innocently paid : *Id.*

PARTNERSHIP. See *Mines and Mining*.

Agreements between—Liability.—Partners may make any agreements they see proper for the management of their joint affairs; but the provisions of such agreements are liable, at least in a court of equity, to be controlled or qualified, or to be held altogether waived, when the assent of all the partners may be fairly inferred from their acts and declarations in the conduct of the firm affairs : *Hall v. Sannoner*, 44 Ark.

One partner is not liable to another for an honest mistake of judgment as to what will be most beneficial to the common interest : *Id.*

Surviving Partner—Expenses of unsuccessful Litigation.—A surviving partner who, in good faith and under an honest belief that he has a good defence, resists, by litigation, but unsuccessfully, the collection of a claim against the partnership estate, will be entitled to contribution for the reasonable expenses of the litigation as part of the expenses of winding up the partnership affairs : *Lee v. Dolan*, 39 N. J. Eq.

PATENT. See *Equity*.

Receiver.—A receiver of an insolvent debtor is entitled to a patent right belonging to the debtor : *Petition of Keach*, 14 R. I.

The words in this statutory provision "exempted from attachment by law," mean exempt by statute : *Id.*

Under this statutory provision the court may order the debtor to assign his patent right to the receiver : *Id.*

Claims for Combinations.—In patents for combinations of mechanism, limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers : *Sargent v. Hall Safe and Lock Co.*, S. C. U. S., Oct. Term 1884.

PAYMENT.

Application of.—The right of a creditor to make application of payments to one of several debts owing from his debtor, applies only to those debts then due; and does not apply at all where the debtor himself makes the appropriation : *Gates v. Burkett*, 44 Ark.

PLEADING.

Replication—Fraud.—A replication of fraud to a plea of release must set out the fraudulent acts relied on, that the court may determine whether they amount to fraud, and that the defendant may know on what to take issue: *Friedburg v. Knight*, 14 R. I.

PRE-EMPTION. See *United States*.

RAILROAD. See *Tuzation*.

RECEIVER. See *Patent*.

STATUTE.

Repeal by Implication.—Where there are two statutes on the same subject, passed at different dates, and it is plain from the framework and substance of the last that it was intended to cover the whole subject, and to be a complete and perfect system in itself, the last act must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed: *Brucken v. Smith*, 39 N. J. Eq.

STREET. See *Action; Constitutional Law*.

SUNDAY.

Contract—Ratification.—A contract of sale made on Sunday is void; but the parties to it may, on a subsequent week day, affirm or adopt its terms, and so become bound by them; and a receipt of the purchase money by the vendor on a week day, would be an affirmation of it and make it good, at least from that time. And a demand of payment on a week day would have the same effect as to the vendor, and would compel the purchaser to elect either to adopt the Sunday terms or to insist on their invalidity: *McKinney v. Demby*, 44 Ark.

TAX. See *Constitutional Law*.

TAXATION

Exemption of Railroad—Subsequent Purchaser—Consolidation.—Exemption from taxation granted to a railroad corporation is a personal privilege, incapable of transfer, and does not pass to the purchaser of the road under a mortgage: *Arkansas Midland Railroad Co. v. Berry*, 44 Ark.

The exemption from taxation granted by charter to the Arkansas Midland Railroad Company, was lost by the subsequent consolidation of that company with the Little Rock and Helena Railroad Company, forming the Central Railroad Company: *Id.*

TENANTS IN COMMON. See *Frauds, Statute of*.

UNITED STATES.

Pre-emption Laws—Requirement of Residence.—The pre-emption laws of the United States are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improve-

ment and the erection of a dwelling thereon. This implies a residence both continuous and personal. The settler may be excused for temporary absences, caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases the requirement of a continuous residence on the part of the settler is imperative : *Bofall v. Dilla*, S. C. U. S., Oct. Term 1884.

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THE AMERICAN LAW REGISTER.

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EMPLOYEES AS FIDUCIARIES OF THEIR EMPLOYERS.

No principle is more firmly settled than that a court of equity exacts fidelity and loyalty from agents and fiduciaries of every sort to their principal, and will strip them of all advantages obtained by breach of trust and confidence. It will clothe them with the character and responsibility of trustees as respects dealings and purchases which involve a breach of good faith, and will turn over upon just terms the fruits of such transactions to the principal: *Glenwaters v. Miller*, 49 Miss. 150, 166. This is a rule of elementary law supported by an almost endless array of citations from English and American text writers, as well as by a multitude of cases illustrative of the manifold application of the principle by the Federal and the various state courts, together with those of the mother country. The principle might also be fortified by citations from the civil law. It is a fundamental doctrine of equity jurisprudence, and has, so often as a case came before them, received the sanction of the purest and most illustrious chancellors and equity lawyers. It prevails wherever the rule of conscience and good morals has found a home. The only questions that can arise in connection with the rule are: Is the person a fiduciary within its scope? Was his conduct such as to fall within its meaning?

It is not unfrequently attempted to restrict the rule to persons who are expressly created the agents, trustees, executors, administrators, guardians or attorneys of the beneficiaries. This narrow

construction of the rule has never been sanctioned. The criterion by which to judge whether the person is within the rule is, not the technical name—attorney, guardian or trustee—by which he has been designated, but the relation subsisting between him and his beneficiary. Is it a fiduciary relation? Does it imply trust and confidence, together with the knowledge of another's affairs. If so, then he is a fiduciary within the rule. Thus directors, officers, agents and employees of corporations or of firms, attorneys, executors, administrators, guardians, any and all persons who are placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that they become interested for him, or interested with him in any subject of property or business, are prohibited from acquiring rights in that subject antagonistic to the person with whose interests they have become associated. Lord ST. LEONARDS says: "It may be laid down as a general proposition that trustees who have accepted the trust (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, or their partners in business, solicitors to the commission, auctioneers, or others who have been consulted as to the mode of sale, counsel or any person who being employed or concerned in the affairs of another have acquired a knowledge of his property, are incapable of purchasing said property themselves except under the restrictions which will shortly be mentioned. * * * For if persons having confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of persons relying on their integrity. The characters are inconsistent:" Sugden on Vendors and Purchasers (14th ed.) 406, top page. The breadth and scope of his lordship's propositions are especially noticeable. Even more so are Mr. Bispham's observations. "The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others, as trustees, executors, attorneys and agents, but also to those who occupy any position out of which a similar duty ought in equity and good morals to arise. Thus it will be enforced against partners, tenants in common, tenants for life, mortgagees, a husband, attorneys at law, and vendees under articles, in favor of copartners, cotenants, tenants in remainder, mortgagors, a wife, clients and vendors, respectively; and these instances must be considered only as illustrations of the principle

and not as an exhaustive catalogue of the parties to whom it will be confined." Bispham's Equity, sect. 93.

Having broadly indicated the persons falling within the scope of the principle, it will be interesting to examine some of the cases upon the very borderland of its application. Winn employed Dillon to obtain for him certain information as to lands in order that he might enter them, which information Dillon gave, but afterwards entered the same in his own name. He was not employed by Winn to enter them for him, but only to furnish him this information. It was held, that a relation of private trust and confidence was thus created which disabled Dillon from doing any act or acquiring any interest in the property adverse to the interest of Winn: *Winn v. Dillon*, 27 Miss. 494, citing *Murphey v. Sloan*, 24 Miss. 658.

Another case, in Wisconsin, involved the sale of a company's property to, among others, its superintendent, concerning whom the court, by RYAN, C. J., in deciding the sale voidable, said: "The superintendent appears to have occupied such a confidential position under the corporation. He appears to have had the principal charge of the general business of the corporation, apparently of all its business, possibly with exceptions not material here. The prosperity of the corporation was thus largely dependent upon him. He appears to have been in charge of the books, accounts, vouchers, papers, &c., of the corporation. He thus had peculiar opportunity of intimate and accurate knowledge of its affairs, perhaps better than the other officers, certainly better than stockholders not officers. He must have been presumed to have been intimately and accurately acquainted with the financial condition and prospects of the corporation, perhaps better than the other officers, certainly better than stockholders not officers. He stood toward the corporation in very much the same relation as the agents and stewards in the English cases stood toward their principals." *Cook v. Berlin W. M. Co.*, 43 Wis. 433, 444. See also, *Blake v. Buffalo Creek Rd. Co.*, 56 N. H. 485.

In another instance plaintiffs were warehousemen, having in their employ one Andrew, as clerk or agent in and about their business. He had access to their books and papers and knowledge of their business and customers. Plaintiffs' lease of the premises occupied by them was about to expire, and they were negotiating with the landlord for a renewal of it. During the negotiation Andrew,

without authority from the plaintiffs, told the landlord that they would probably give up the warehouse, and if so, he would take it, and the landlord, without receiving definite information from the plaintiffs that they intended to surrender the premises, but believing such would be the case, gave Andrew and an associate a lease of them. Andrew's object in obtaining the lease was to go into the warehouse business on his own account, and he solicited from some of the plaintiffs' customers their storage, stating that he had become the lessee of the warehouse because Gower & Gilman (the plaintiffs), did not want it any longer. During all this time Andrew was in the employ of plaintiffs, but he was dismissed as soon as they learned he had taken the lease, and an injunction applied for. MYRICK, J., for the court, said: "We think the injunction should have been granted. * * * We understand it to be the duty of the employee to devote his entire acts, so far as his acts may affect the business of his employer, to the interests and service of the employer; that he can engage in no business detrimental to the business of his employer; and that he should in no case be permitted to do for his own benefit that which would have the effect of destroying the business to sustain and carry on which his services have been secured. * * * It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, viz.: to state to them all the facts and ask them to determine whether they desired a renewal. By pursuing the course which he did he gave Hopkins the landlord an inducement not only not to give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental; and he compelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity, or good conscience." *Gower v. Andrews*, 59 Cal. 119.

The question was even more thoroughly examined in *Davis v. Hamlin*, 108 Ill. 39. In this case Hamlin, the lessee of the Grand Opera House in Chicago, employed Davis as manager. Acting as manager Davis corresponded with parties having attractions in reference to the terms on which they could be engaged, allotted to these attractions the time they were to occupy the house, employed the workmen, supernumeraries, orchestra and other theatrical help, supervised books and accounts, paid bills, and made nightly settlements with parties performing at the house, and in general did

everything which a proprietor or manager of a theatre usually does, subject only to Hamlin's approval or veto. He knew the theatre was profitable property and conceived the idea of securing the renewal of the lease of it to himself. He went to the owner of the premises, Borden, and made an offer to rent the theatre at a rental of \$5000 in excess of Hamlin's offer. This offer was secret, and in reply to Hamlin's inquiry whether he was bidding for the house he denied that he was doing so and advised Hamlin not to offer more than a reasonable price for it. He secured the lease, and Hamlin filed a bill to enjoin him from transferring it to innocent parties without notice and to compel its assignment to him. Davis claimed that he was not within the rule giving a *cestui que trust* the benefit of his trustee's acts, because he had not been employed to procure leases, but only to act as manager of the theatre; that it was no part of his duties as business manager to obtain a new lease of the theatre. Chancellor TULEY, in deciding the case at *nisi prius*, said: "I cannot agree with defendant's counsel in this narrow limitation of this broad principle of equity founded upon good morals and public policy. I do not deem it necessary that a confidential employee in a business, in order to come within the rule, should have any specific duty to perform in a matter which may affect that business. His duty need not necessarily be an active duty. It may be one of abstention only, or negative in its character. In this case it was clearly the duty of Davis to abstain from doing anything which would interfere with his employer in his efforts to obtain an extension of his lease. It was his duty not to overbid his employer. It was his duty not to place himself in a position where his duty as employee and his interest would come in conflict. It was his duty to inform his employer of all facts coming to his knowledge touching the re-leasing of the theatre; but in place thereof he concealed from him and denied his own efforts to obtain the lease, thereby practically removing the competition of his employer." * * * "If Davis had gone to Borden (the landlord) and offered Borden that he would use his confidential relation with Hamlin—his influence over Hamlin—to induce him to pay a much larger rental than he (Hamlin) was willing to pay if he (Borden) would give him (Davis) 10 per cent. of the rental value Hamlin should agree to pay, and Borden had accepted, and had thereby obtained a greater rental from Hamlin, could it be doubted for one moment but that a court of equity would

say to Davis: 'You cannot in good morals hold that 10 per cent. of the rental for your own use—it must be turned into the business of which you agreed to take the 10 per cent. of the net profits?' Would not any court of justice stamp the act as one of breach of confidence and treachery on the part of Davis towards Hamlin?"

"If such would be the nature of the act supposed, how can his conduct be defensible in the present case when receiving 10 per cent. of the net profits (this was Davis's compensation) he attempts to oust his employer from the entire business and appropriate all the profits to his own use." (Per TULEY, J., decision not printed.)

This view was upheld by the appellate court, and ultimately by the Supreme Court of Illinois, and which said in reply to the contention that the relation between Hamlin and Davis was that of master and servant, or employer and employee, that the rule has never been applied to that relation as a class, and that the classes coming within the principle are those embraced within the list of defined confidential relations, such as trustee and beneficiary, guardian and ward, &c. "The subject is not comprehended within any such narrowness of view as is presented on appellant's part. In applying the rule it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." Per SHELDON, C. J., in *Davis v. Hamlin*, 108 Ill. 48. See also *Greenlaw v. King*, 5 Jur. 19; *Hamilton v. Wright*, 9 Cl. & Fin. 111; *Keech v. Sandford*, 1 Lead. Cas. Eq. 53; *Devall v. Burbridge*, 4 W. & S. 305; *Hill v. Frazier*, 22 Penn. St. 320; *Fairman v. Bavin*, 29 Ill. 75; *Gilman, C. & S. Railroad Co. v. Kelly*, 77 Ill. 426; *Bennett v. Van Syckel*, 4 Duer 462; *Gillenwaters v. Miller*, 49 Miss. 150; *Grumley v. Webb*, 44 Mo. 446.

There may even be no relation of employer and employee, master and servant, attorney and client, &c., &c., existing, and still the parties may occupy such a position toward each other of *trustee* and *cestui que trust*. *Ex parte Hughes*, 6 Vesey 624, illustrates this point. In that case the contract was one of sale. The person making it did not sustain as to the person as to whom the contract was declared void any relation of trustee or agent. He was simply his creditor. It was intended by the debtor's representative, a receiver, to have a sale of the debtor's property, and a consultation was in progress in a private room as to the upset price to be fixed for said sale. Pending this discussion, Mr. Hughes, the creditor, entered, and was informed that there was a difference of opinion

among those present as to what price certain of the property should be put up for sale, and Mr. Hughes's views were solicited. He said he would abide by what one Mr. Dyke thought right, that gentleman having heard the views of those advocating the different prices, thought the property should be put up at 2000*l.*, and to this Mr. Hughes assented. It was accordingly put up at 2000*l.*, with a declaration that if any one advanced upon that sum it would be knocked down to him. After a considerable time, no one bidding, Hughes advanced 10*l.*, and was declared the purchaser. Lord ELDON said: " * * * I do not impute fraud to Hughes. * * * The first question is very considerable: whether Hughes could be permitted to bid. It is not necessary to give an opinion upon that, but I will go the length of saying it is extremely difficult in equity to sustain the title of a person dealing under the circumstances in which he then stood. If Hughes could bid, or the solicitor tendering the estate to sale, or agents for the sale however constituted, and if the danger of that species of transaction is compared with the danger of a purchase by a trustee, the court would overlook a danger far more considerable than that at which it looks with so much anxiety." See also *Torrey v. Bank of New Orleans*, 9 Paige 649; *Greenlaw v. King*, 5 Jur. 18, where Lord COTTENHAM approves *Ex parte Hughes*.

The principle deducible from all the cases is that where a man is employed in anywise on another's behalf or occupies any fiduciary relation towards such other, no matter how such employment or relation may have arisen or been created, he cannot take to himself any benefit growing out of the subject-matter of the employment or relation, whatever may be the manner of the taking. An employee, agent or fiduciary cannot make himself an adverse party to his principal. This is a consequence of the confidential relation subsisting between the parties, and not of the fact that one of them is technically named an agent, or guardian, or attorney or other well-known designation of trust. The criterion is the relation not the name. Nor is there room for any moral hair-splitting or sophistical reasoning in applying the rule to all fiduciaries whatsoever. The principle is not to be trifled away. It is a just rule, sanctioned by the promptings of every honest man's heart and conscience. It should be firmly upheld and applied, whether a precedent be found for applying it to the case in hand or not. It is enough if such a case be within the principle and the reason thereof. It cannot be

said that a court of equity can go nowhere except it has some specific case, like a plank to walk forth upon. As Judge TULEY remarked in the *Hamlin-Davis* case: "The law recognises the fact that the business of the world cannot be carried on without confidential relations existing, and also that man is 'unco' weak and little to be trusted, and therefore declares the person occupying the fiduciary relation incapacitated, as against his employer to obtain any interest or advantage by a breach of the trust relation, or in the language of one of the judges, 'The wise policy of the law has therefore put the sting of disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.' " (Per TULEY, C. J., decision in *Hamlin v. Davis*, not reported.

ADELBERT HAMILTON.

Chicago.

RECENT ENGLISH DECISIONS.

Court of Appeal.

MITCHELL v. DARLEY MAIN COLLIERY CO.

The plaintiff was the owner of certain land, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to the plaintiff's land, which subsided in consequence of the defendant's excavation. Some cottages of the plaintiff standing on his land were damaged by the subsidence and were repaired by the defendants. In 1882 a second subsidence of the plaintiff's land occurred owing to the defendant's workings in 1867 and 1868, and the plaintiff's cottages were again damaged. *Held*, that the plaintiff was entitled to maintain an action for the damage done to his cottages in 1882, and that his right to sue was not barred by the Statute of Limitations.

Nicklin v. Williams, 10 Ex. 259; *Backhouse v. Bonomi*, E., B. & E. 622; 9 H. L. Cas. 503; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765, discussed; *Lamb v. Walker*, 3 Q. B. Div. 289, overruled.

ACTION for damages for injuries done to three cottages and six perches of land belonging to the plaintiff.

The writ of summons was issued on the 27th of December 1882, and the action itself came on for trial before HAWKINS, J., at the Summer Assizes held at Leeds in August 1883, and the following facts were admitted or proved:

On or about the 11th of December 1866, the plaintiff, by virtue of a deed of conveyance bearing date on that day, became the tenant in fee simple of six perches of land situate at Ward Green, in

Worsbrough, in the parish of Darfield, Yorkshire. Prior to the year 1878, six cottages had been erected thereon, and in or about that year, these six cottages were pulled down, and three cottages were erected on the site of them. The defendants were the lessees of a seam of coal about nine feet in thickness under the land upon which the plaintiff's cottages stood, and under certain adjoining land; they had worked the seam during the years 1867 and 1868, but not afterwards. A subsidence owing to the defendants' workings took place in 1868 and continued until 1871, and the plaintiff's six cottages which then stood upon his land were damaged by that subsidence, and were afterwards repaired by the defendants. In 1882 a further subsidence, caused either wholly or in part by the defendant's excavations during 1867 and 1868, occurred, and thereby damage was done to the plaintiff's land, and to the three cottages then standing thereon. The present action was brought to recover compensation for the damage done by the subsidence happening in 1882, and the defendants, amongst other defences, pleaded that the alleged causes of action did not arise within six years before the commencement of the action, and that the plaintiff's right to sue was barred by the Statute of Limitations.

The jury summoned to try the issues of fact having been discharged by consent, the action was reserved for further consideration, and ultimately HAWKINS, J., directed judgment to be entered for the defendants. The learned judge was of opinion that *Lamb v. Walker*, 3 Q. B. Div. 389, was an authority in point for the present action, and felt himself bound by the decision of the majority of the Queen's Bench Division in that case.

The plaintiff appealed.

Alfred Wills, Q. B. (*C. E. Ellis*, with him), for plaintiff.

John Forbes, Q. C. (*Pain*, with him), for defendants.

BRETT, M. R.—In this case the plaintiff has brought an action against the defendants for an injury to his property arising, as he alleges, from something done by the defendants on their own property. The plaintiff was the owner of property on the surface, and the defendants were, and are, the owners of the mines immediately under or close to the plaintiff's property. In 1868 the defendants worked out the whole of one seam of coal, said to have been a seam of about nine feet in thickness. It would seem that soon

after that excavation of theirs, and by reason of it, the surface was interfered with and sank, and in consequence of that sinking some property of the plaintiff's was damaged. The plaintiff made a claim in respect of that damage to his property, and it was repaired by the defendants. That seems to me to be precisely the same as if the plaintiff had brought an action against the defendants and had recovered damages; the money would have been wanted in order to enable him to execute the repairs. It is not alleged by the plaintiff that any further damage was done to any property of his by the actual subsidence which then took place, that is, soon after 1868. If the ground had not moved any more, there would have been no further injury to his houses. The houses had been repaired and there was an end of that. It seems clear to me that, perhaps in consequence of something that was done by somebody else, and certainly not in consequence of the defendants having done anything in the meantime, but having left this excavation as it was, a subsidence took place: not the same subsidence which had done the former injury, but a new subsidence; and the plaintiff alleges—and I think it must be taken to be so—that this new subsidence has done him some appreciable injury. Accordingly he brings this action in respect of an appreciable injury caused by that new subsidence. The objection taken to him is, that he has brought this action too late. The argument is that as he has brought this action more than six years after that first subsidence which gave him a cause of action, therefore he cannot maintain it, because in an action brought at the time of the former subsidence he might have recovered damages prospectively for what has since happened to him. That is the answer of the defendants. The reply on the part of the plaintiff is this: the fact of the defendants excavating their minerals gave him no cause of action; it did him no injury by itself; they had a right to do it; the mines were their own property, and they had a perfect right to do what they liked with their own, so long as they did not hurt him. When they excavated the minerals which were their own property, if they had then and there taken means to prevent the sinking of the plaintiff's property, he would have had no cause of action against them; what they did in excavating was perfectly lawful, if they had taken care that in so using their property, they did not hurt him: but in 1868, or immediately afterwards, they did something which did give him a cause of action, that is, they caused his land to subside, and that subsi-

dence caused by them was his cause of action; they caused that subsidence by mining, and by not propping so as to prevent the plaintiff's land subsiding afterwards. That cause of action was settled between them when they repaired his houses; but now they have done him a new and wholly independent injury; they have caused his land to subside again. It is true that in this case it is at the same spot as before, but it might have been a hundred yards off: it is a new subsidence. They have caused that subsidence by the excavation of the minerals in 1868, and by not having filled up that excavation before 1882. It is no answer to the plaintiff in respect of this new subsidence, which is the new injury to him, to tell him that the *causa causans* of that was the same as the *causa causans* of the old subsidence. That *causa causans* gave to the plaintiff no right of action at all in either case; but the two different results from it have given the plaintiff two causes of action, and although it is true to say that for the same cause of action, successive actions for damages cannot be maintained, yet there may be any number of successive causes of action. That is the whole dispute between the parties. Therefore we must consider what is the real cause of action.

In *Backhouse v. Bonomi*, 9 H. L. Cas. 503, it was argued that the cause of action was the excavation, and that the subsidence was merely a damage resulting from the excavation. Upon that argument it was urged on behalf of the defendant that the action was brought too late, because it was brought more than six years after the excavation, although it was commenced within six years after the subsidence. The application of *Backhouse v. Bonomi*, 9 H. L. Cas. 503, depends upon a view of the facts, which was raised by a question proposed to the learned judges. That question had nothing to do with successive subsidences, the consequence of one excavation. The question put to the judges was, in effect, that if there is only one subsidence, the result of one excavation, is the Statute of Limitations to run from the time of the excavation or from the time of the subsidence, the words of the Statute of Limitations being that an action must be brought within six years after the cause of action accrued? That raises the question, what, in such a case, is the cause of action? If the excavation was the cause of action, it having been rendered wrongful by the subsequent subsidence, even in that view the wrongful act was the excavation. But the House of Lords held that the excavation was not originally a wrongful act, and because it is not originally a wrongful act, it is not made

a wrongful act by something happening subsequently. An act which is right at the time when it is done cannot be turned into a wrongful act by something that happens subsequently. Therefore, it was held that the excavation was not the cause of action; it was only the cause of the cause of action; the cause of action was the subsidence, and that alone; the defendant had so used his property as to make the plaintiffs' property subside, and it was the making their property subside which was the cause of action. Thereupon, the law lords said, that the statute ran from the time when the cause of action accrued, and that was the moment of the subsidence. *Backhouse v. Bonomi*, seems to me not to have decided in direct terms the question of successive subsidences, although I think that it follows from *Backhouse v. Bonomi*, that successive subsidences, when they are independent subsidences, are independent causes of action, but as to this latter point *Backhouse v. Bonomi*, does not bind us by its authority.

Nicklin v. Williams, 10 Ex. 259, had occurred before *Backhouse v. Bonomi*. I do not think it was necessary in *Backhouse v. Bonomi*, for the House of Lords to determine whether *Nicklin v. Williams*, was right: I say again that the logical conclusion from *Backhouse v. Bonomi* is to show that *Nicklin v. Williams* was wrong, but it is not necessary to overrule it. If *Nicklin v. Williams* is right, we ought to give judgment in favor of the defendants, because that case raised the same point as is raised now. It is true that the question in that case was raised upon demurrer, but it was precisely the same as that now raised, because there an excavation had been made and a subsidence had happened. The defence was that the cause of action in respect of that subsidence had been satisfied. The plaintiffs pleaded as a new assignment, that they were not suing for that cause of action which had been satisfied, but for a new and different cause of action, namely, a subsequent subsidence. It was argued for the defendant that the new assignment was bad, for it is only a new assignment of a damage which was the result of the former cause of action. If that had been true, the objection of the defendant would have been good. The Court of Exchequer upheld the argument for the defendant, and they decided that the new assignment was bad. Although they did not so express themselves in terms, I think their judgment must have been based on the ground that the new assignment was really a claim for more damages than had been recovered in the first action, and that the

damages claimed were damages for the same cause of action. Therefore the result is that where an excavation has been left which causes one subsidence, if it is still left and causes another subsidence, then the second subsidence is a part of the damages of the first cause of action, and is not itself a new cause of action. But if the subsidence itself is the cause of action, and if the two subsidences are different and independent subsidences, although the *causa causans* of both is the same, it seems to me that there are two different causes of action, and then the decision in *Nicklin v. Williams* was wrong. I have already intimated that in my view the logical conclusion from *Backhouse v. Bonomi* shows distinctly that *Nicklin v. Williams* was wrong. Therefore, I am of opinion that *Nicklin v. Williams* cannot be supported as good law.

Then we come to the case of *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765. That was not a mining case, but it seems to me that it raised precisely the same principle, and the same kind of question. There the trustees of a turnpike road made a covered drain by the side of the highway. They made it in such a manner that it collected water in it, and that the collected water was caused to flow into the plaintiff's mines. The drain had been so built that it did not allow the water to go elsewhere than into the plaintiff's property. The trustees relied upon a statutory defence that they had made the drain more than three months before action; but it appeared that the plaintiff had sustained damage within three months. What is the difference between the two cases? In the one case an excavation is made in the earth by an owner in his property, the result of which is that his neighbor's property subsides. In *Whitehouse v. Fellowes*, *supra*, a drain was made which the trustees had power to alter, or to take up; they made it, not in the mine owner's property but in property over which they had a power, and which therefore, as far as the mine owner was concerned was a different property from his; it injured him and gave him a cause of action; and they kept the drain without altering it. The Court of Common Pleas said the *causa causans* of the injury to the property was a continuing cause; but that cause alone gave to the mine owner no cause of action, it was a cause which if thereby any damage was occasioned to the mine owner's property, would immediately give him a cause of action; it had given a cause of action some time ago, but since that the trustees continued it; they might have stopped it. the continuing *causa causans* remained, and remained in the power

of the trustees, and that caused a new injury to the mine owner's property; that was a new cause of action because it was an injury to the mine owner's property in each case. It seems to me that the case of *Whitehouse v. Fellowes* is in direct conflict in principle with the case of *Nicklin v. Williams*, and that it is impossible as a matter of principle to allow both those cases to stand together. Inasmuch as I have already expressed an opinion that *Nicklin v. Williams* was wrongfully decided, I come to the conclusion that *Whitehouse v. Fellowes* was rightly decided, and further that *Whitehouse v. Fellowes* is in accordance with the principles laid down in *Backhouse v. Bonomi*.

Then I come to the case of *Lamb v. Walker*, 3 Q. B. Div. 389, and, to show how difficult all this is, in the case of *Lamb v. Walker*, which was decided after the other two cases and after *Backhouse v. Bonomi*, eminent judges of great learning were in direct conflict of view, and anything more directly in conflict than the views of the Lord Chief Justice and MANISTY, J., cannot be conceived. They are just as much in conflict as the case of *Whitehouse v. Fellowes* is in conflict with *Nicklin v. Williams*. We have had these judgments carefully analyzed before us; and I think that we must agree either with the Chief Justice or with MANISTY, J., and if we agree with one of them we must disagree with the other. I cannot help thinking that the judgment of the Lord Chief Justice, which he might have founded entirely upon *Backhouse v. Bonomi*, examines the whole subject afresh, and gives the most weighty reasons to show, that in such a case as this the only cause of action is the subsidence of the plaintiff's land, and if that subsidence has been brought about by the defendants—whether or not by the omission of something after commission, that is, without taking precautions against the consequences of an act of commission by them—each subsidence is a new cause of action. I cannot see myself any answer to the case put by the Lord Chief Justice, which is this. Where an excavation has been made, and a subsidence has taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once, and I incline to think that he ought. It is not necessary to determine that in this case, but I am strongly inclined to think that he ought. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbor's property, and he knows that

that neighbor is entitled to damages for it ; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting a wall or propping up his own property ? There is nothing to prevent him ; will he allow that to continue or will he not ? If he does nothing, he is not counteracting the effects on his neighbor's property of something which he has done on his own ; he is not counteracting that mischief to his neighbor by doing something on his own property ; and if there is a new subsidence that will give his neighbor a new cause of action. The Chief Justice says it is difficult to conceive that the jury, which is the tribunal that is to give damages for the first subsidence that is existing, ought to give damages for a prospective new subsidence which the defendant has the option and the right to prevent ; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given the mine owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. That seems to me to be a proposition which, when it is well sifted out and examined, cannot stand, and therefore, the Chief Justice's reasoning, of itself, and without reference to *Backhouse v. Bonomi*, is conclusive to show that each subsidence is a fresh cause of action. Besides that, it seems to me in accordance with what was decided in *Backhouse v. Bonomi* and to be the logical result of *Backhouse v. Bonomi*. Therefore, with great deference to my Brother MANISTY, I think the judgment of the Chief Justice is to be preferred. I think that the judgment of MELLOR, J., in that case was not a judgment of his own mind, acting independently, but only an inquiry whether he was concluded by authority, and at that moment and at that time it may be that the case was. Therefore, I agree with the Lord Chief Justice's view that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same.

It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation ; the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of it remaining unremedied. Therefore, whilst I am strongly of opinion, although it is not necessary to decide it in this case, that in respect of the same subsidence the jury ought to take into account, not only the actually existing

damages caused by that subsidence, but also the prospective damages which may be the result of that subsidence, yet I think that where there is a new and further subsidence, that is a new cause of action. If that is so, the plaintiff is right in this case, and is entitled to succeed. The result of our judgment is, that this case will be referred to some arbitrator who will have to determine the amount of damages caused by this second subsidence. What the measure of damages is in that inquiry, is not for us now to determine.

BOWEN and FRY, L. JJ., delivered concurring opinions.

That a statute of limitations does not commence to run until the plaintiff has a complete and perfect cause of action, is, of course, elementary law. That a complete cause of action does not exist until the plaintiff has sustained some damage, is equally true; though its application is not always clearly understood, or perhaps correctly made. Lord HOBART, C. J., long ago, in *Waterer v. Freeman*, Hob. 267 a, laid down the rule thus: "There must be not only a thing done amiss, but also a damage, either already fallen upon the party, or else inevitable." And long before that it had been declared in the Year Book of 19 Hen. VI. 44, "If a man forge a bond in my name, I can have no action, yet; but if I am sued, I may, for the wrong and damage, even though I may avoid the bond by plea."

The difficulty in the application of this principle is to determine in what cases damages do arise, or are presumed to arise, immediately upon the execution or completion of an act, so as to give an immediate cause of action, and when not. And without considering the subject of actions upon contracts, but only those arising from torts, positive or negative, some light may be gathered from a few illustrations. The question always is, was the act done itself, and under all circumstances, a legal wrong; an invasion of a fixed and absolute right, to which the law always imputes at least nominal damages, or was it an act harm-

less in itself, and only a legal injury when attended or followed by actual injurious consequences to another? If one commit an assault and battery upon another, the latter's right of action is of course at once complete and perfect at the commission of the offence; some damage instantly accrues, and no subsequent increase or development of the injury, however great, or however subsequent in time, so long as it is a consequence of the original tort, can ever constitute a new cause of action, as was clearly established in *Whitney v. Clarendon*, 18 Vt. 258; *Hodsoll v. Stallerbrass*, 3 P. & Dav. 203; 11 Ad. & E. 306; *Gustin v. Jefferson*, 15 Iowa 158, and other cases. Consequently the statute of limitations begins to run from the time of the assault, and not from the time of its subsequent consequences.

If personal property is wrongfully taken from the possession of the owner, his cause of action is complete and perfect at the moment, and he acquires no new or second cause of action by the fact of a subsequent injury to or destruction of the chattel by the wrongdoer; consequently the period of limitations arises from the original act of taking, and not from the subsequent destruction: *Granger v. George*, 5 B. & C. 149; *Clarke v. Marriott*, 9 Gill 331; *Johnson v. White*, 13 Sm. & Marsh. 584.

And if such property is wrongfully taken from the possession of a lessee or bailee for a fixed term, his right of ac-

sion commences immediately, for the act of taking is, *per se*, an invasion of his right of present possession, and no other proof of damage would be necessary; but the lessor or bailor would not have a right of action without proof of actual damage or injury to the chattel itself; i. e., his reversionary rights thereto. Consequently the statute of limitations would run only from that time.

If a person utters some kind of slanderous words, such as are slanderous *per se*, some damage is presumed at once, and the cause of action arises, once for all, upon the utterance; but if he utters some other words, such as not slanderous *per se*, no cause of action exists until some special or actual damage has been occasioned to the plaintiff, which may be a long time subsequent to the speaking: *Swan v. Tappan*, 5 Cush. 104; consequently the limitation does not commence until that event.

On similar grounds it has been held, that in an action by a father for the mere loss of his daughter's service, caused by her seduction and subsequent confinement, the limitation begins to run when the loss of service accrued, and not from the time of seduction: *Hancock v. Wilboite*, 1 Dav. (Ky.) 313; though as to an action for the mere seduction, it might be different.

So, if an officer has been guilty of negligence in serving or not serving legal process, committed to him by a plaintiff, the latter's cause of action does not arise at the time of the negligence, but only at the time he sustains actual perceptible damage as the result of such negligence; and, consequently, his right is not barred until the statutory period has elapsed after the occurrence of such damage. This was elaborately vindicated in *The Bank of Hartford Co. v. Waterman*, 26 Conn. 324. See, also, *Williams v. Mastyn*, 4 M. & W. 145; *Planck v. Anderson*, 5 T. R. 37; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Roberts v. Read*, 16 East 215;

Gillon v. Boddington, 1 C. & P. 541; *Whitehouse v. Fellows*, 10 C. B. N. S. 765.

If a party sustains an injury to his land by the obstruction of a watercourse, his right of action commences when he sustains the damage, and not necessarily when the obstruction is erected; and therefore the statute commences from the time of the injury: *Angell on Lim.* § 300; *Union Trust Co. v. Cuppy*, 26 Kans. 756.

In other words, if an act, in and of itself, always gives a cause or right of action at once and immediately upon its commission, then there can be but one suit for such act, and all damages, prospective as well as existing, must be recovered in the first action or not at all. No new development of damages, not suspected or known before, can give a right to a second suit. But where an act is itself innocent, and does not give a right of action unless coupled with or followed by actual appreciable damage, then as two facts must concur in order to support a suit, there can be no complete cause of action until the second event happens, and, consequently, the statute of limitations does not begin to run until that time.

Therefore, to apply the foregoing suggestions to the facts involved in the principal case. Every man has a right to excavate on his own land—that act alone gives a neighbor no right of action until his land falls in consequence, and he thus sustains actual damage. If the party excavating shores up the neighboring land, and stays its subsidence, he is not liable. Therefore, it is clear an action would not lie for such excavation until the first subsidence. But the more delicate question is, whether, if there has been one action based on the first subsidence, a second action can be maintained for a second subsidence? or whether that should have been anticipated in the first suit, and recovered as prospective or reasonably to be anticipated damages in the first suit.

It does not necessarily follow that because no action will lie for such excavation until some subsidence of the plaintiff's land, that, therefore, a new action may be maintained for every succeeding subsidence; and the point involved in the principal case is so novel and so delicate, there has been so much conflict of

opinion on it in England, and so little consideration of it in this country, that it must be considered an open one with us, and deserving the most careful examination whenever it shall properly arise.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Kentucky.

SULLIVAN, &c., v. KUYKENDALL.

Where A., desiring to talk over the telephone with B., asked the operator to call him, and the operator thereupon had a conversation with B., reporting to A., who was standing by, what B. said as it came over the wire, *held*, in a subsequent action between A. and B. the former might prove by himself and others what the operator reported to him as coming from B., the operator being called and not remembering the conversation.

The fact of mailing a letter, properly addressed, with postage prepaid, creates no legal presumption that it was duly received; but it is merely a fact which is to be weighed along with other evidence in determining the question, and to which no more presumption attaches than to any other fact.

APPEAL from Warren Circuit Court.

Hansell & Mitchell, E. W. Hines, for appellants.

N. A. Porter, for appellee.

The opinion of the court was delivered by

HOLT, J.—By the terms of a verbal contract for the sale of personal property the appellants, Sullivan & Co., were to estimate and receive it within ten days after notice from the appellee, Kuykendall, that it was ready.

On January 26th 1880, he wrote them a letter, which by due course of mail should have been received by them within the next two days, but which in point of fact, as the testimony shows, was not received until February 17th 1880, notifying them that the property would be ready for them on February 9th 1880.

About February 11th or 12th 1880, Green river began rising and by the 13th of the same month had overflowed its banks; and the property being along them, was in the main destroyed.

The letter above named was properly enveloped, stamped and

deposited in the post-office, and addressed to the appellants at their usual post-office.

The lower court in substance instructed the jury that if they believed from the evidence that said letter was written, addressed to the appellants at their proper post-office, duly stamped, and placed in the office, then the presumption was that it was received in due course of mail; and that this presumption must prevail, unless overthrown by satisfactory evidence, that it was not so received.

This instruction was doubtless based upon the statement to be found in some text-books, and a few cases to the effect that when a letter is sent by the post it is to be presumed from the known course in that department of the public service that it reached its destination at the usual time, and was received by the person to whom it was addressed, if living there, and usually receiving his letters at that place.

It will be found, however, that the most of these cases go no farther than to hold that, in the absence of all other evidence upon the point, the mailing of a letter, properly directed, raises a presumption that it was received; and that this presumption must prevail unless rebutted by other testimony.

In the leading case of *Huntley v. Whittier*, 105 Mass. 391, the learned judge (GRAY, J.) said that the depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of mail; but that the jury should be so instructed only in the *absence* of other testimony upon the point.

The case of *Russell v. Buckley*, 4 R. I. 525, is to the same effect; while authority is abundant that the mailing of a letter creates no presumption whatever that it was duly received.

In *United States v. Babcock*, 3 Dillon's C. C. Rep. 571, Judge DILLON uses this language: "Upon the subject of the admissibility of letters, by one person addressed to another, by name, at his known post-office address, prepaid and actually deposited in the post-office, we concur, both of us, in the conclusion, adopting the language of Chief Justice BIGELOW in *Commonwealth v. Jeffries*, 7 Allen 563, that this is evidence tending to show that such letters reached their destination, and were received by the persons to whom they were addressed."

"This is not a conclusive presumption; and it does not even

create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters."

In the case of negotiable paper it has long been held that the depositing of a letter in the post-office by the holder to the indorsers is not only good *prima facie* evidence, but sufficient to establish the fact that notice was given; but this rule has been established by the law merchant through commercial necessity.

By the common law this presumption did not exist even as to negotiable paper; and after a careful examination of the authorities we are satisfied that it ought not to be held to arise in ordinary business transactions, and especially between men whose business does not require them to watch the arrival of the mails: *Freeman v. Morey*, 4 Me. 50; *Nat. Bank v. McManigle*, 69 Penn. St. 156; *Greenfield Bank v. Crafts, &c.*, 4 Allen 447.

The mailing of the letter in this instance created no legal presumption, but was proper testimony to be considered by the jury, together with the other evidence, in determining when it was received; and they should not have been instructed that a presumption arose from it, which must prevail unless overthrown by other satisfactory evidence.

The instructions in other respects were unobjectionable.

The appellants relied upon an alleged new contract between them and the appellee, by which the one sued upon was annulled; but this was a question of fact as to which the testimony was conflicting, and the finding of the jury would not therefore be disturbed, if this were the only question presented by this appeal.

In view of another trial of the case it is proper that we should pass upon what seems to us to be a new question as to the competency of certain testimony; at least we have been unable to find any direct authority upon it.

The appellee upon going to the place, on February 9th 1880, where the property was to be received did not find the appellants or any one representing them there.

He thereupon went to a telephone office at Morgantown, Kentucky, for the purpose of communicating with the appellants at Bowling Green, Kentucky; and not being accustomed to the use of the instrument he got the operator to talk for him. He first directed him to call for the appellant, Sullivan, and he did so, the Bowling Green operator reporting back that he would send for him

to come to the office. Presently the Morgantown operator told the appellee that Sullivan was at the Bowling Green office and desired to know what was wanted; and thereupon a conversation took place, Sullivan using the instrument himself while the Morgantown operator talked for the appellee, and told him what Sullivan said as it came over the wire.

The latter testifies that on that day he had a conversation over the telephone with some one at Morgantown, and upon the same subject to which the appellee says the conversation related; but they differ widely as to what was said. The Morgantown operator, being introduced as a witness, testifies that upon the day named he had a conversation upon that subject with some one at Bowling Green, whom the operator there told him was Sullivan, but that he does not recollect what was said. Under this state of case the court below permitted the appellee to prove by himself and two other persons, who were present at the time, what the Morgantown operator reported to appellee, while the conversation was going on over the wire, as being said by Sullivan.

It is certain that the latter did talk over the wire, because he says so. The appellee did not pay the telephone charge; and it does not appear who did, save the Bowling Green operator reported to the Morgantown one that Sullivan would do so; and the latter is silent upon this point.

It would beyond question have been competent to prove by the Morgantown operator what Sullivan said to him; but whether his report to the appellee of what Sullivan was saying, made as the conversation progressed, is competent or falls within the domain of incompetent hearsay testimony, is a question of importance in view of the astonishing growth of the business to which it relates, and one not free from difficulty.

In the case of a telegram the original must usually be produced in evidence, or its loss shown, before its contents can be proven or the copy delivered by the operator to the party receiving the message used, unless it be where the copy becomes primary testimony by the telegraph company being the agent of the sender.

In the use of the telephone, however, the parties talk with each other as if face to face; and, save where a message is sent, there is no written evidence of what has passed. By inventive means they are brought together for the transaction of business.

It is a well settled rule that where one through an interpreter

makes statements to another, the interpreter's statement at the time of what was so said is competent evidence for the party.

The interpreter need not be called to prove it; the interpreter's statement made at the time may be proven by those who were present and heard it; *Camerlin v. Palmer*, 539; *Schearer v. Harber*, 26 Ind. 536; 1 Greenl. 1; 1 Phillips's Ev. *519.

The reason of this rule is, that the interpreter is the agent of the parties, and acting at the time within the scope of his agency, and we have been unable to draw any satisfactory distinction between this case and the one under consideration.

The argument is at least plausible, if not correct; the testimony in question is competent as a part of the evidence from the question of agency.

It is true the parties cannot see each other; but the use of an interpreter between blind persons could be proved by the parties, without calling the interpreter as a witness. By telephonic means persons are as much together for the purpose of conversation and actors in what may be occurring as if immediately present with each other.

We must not be understood, however, as holding the interpreter competent upon the above ground, because there is no authority for so ruling which is conclusive to our minds.

Subject to various qualifications the old rule that the interpreter produce the best evidence within his power to prove the facts govern. But as business expands by the aid of the telephone a wider scope must be given to the rules of evidence. The need, however, of any departure or innovation in this respect is a well-settled rule of evidence that the statements made by the interpreter when acting within the scope of his agency, are competent evidence for his principal.

When one is using the telephone, if he knows that he is talking to the operator, he also knows that he is making his statement to repeat what he is saying to another party; and in such cases certainly the statements of the operator are competent evidence. The declarations of the agent made during the progress of the action.

If he is ignorant whether he is talking to the person to whom he wishes to communicate or with the operator, or to

party, yet he does it with the expectation and intention on his part that in case he is not talking with the one for whom the information is intended, that it will be communicated to that person; and he thereby makes the person receiving it his agent to communicate what he may have said. This should certainly be the rule as to an operator, because the person using a telephone knows that there is one at each station whose business it is to so act; and we think that the necessities of a growing business require this rule, and that it is sanctioned by the known rules of evidence.

Judgment reversed.

Judge PRYOR delivered the following dissenting opinion.—The question decided in this case is novel and of great importance to the commercial world.

The terms of a contract are attempted to be established by messages alleged to have been forwarded by one to the other of the parties over a line of telephone extending from Morgantown to Bowling Green.

The appellee being desirous of showing that the appellant agreed to receive a lot of hoop-poles on the bank of Green river within a certain time, applied to the telephone agent at Morgantown to ascertain from Sullivan, the appellant, at Bowling Green, why he did not attend for the purpose of receiving the poles. The agent at Morgantown telephoned to the agent at Bowling Green in regard to Sullivan, who sent a message back that Sullivan was present at Bowling Green and would answer for himself.

The message sent by Sullivan was (as Sullivan swears, and that fact is nowhere contradicted), to the effect that he had not been notified that the hoop-poles were ready, and therefore did not send to receive them. The appellee says that the message he received from Sullivan at Bowling Green was, that the agent of appellant was sick and for that reason did not send him down. This is denied by Sullivan, and the operator at Morgantown recollects that the message was in regard to the hoop-poles, but fails to recollect what it was. The appellee was then allowed to prove what the agent at Morgantown told him as to the character of the message, and that was "that he failed to send because Allen was sick." He was also allowed to prove, by one or two others in the room, that the telegraph operator at Morgantown made that statement to the appellee. It is not pretended that either the appellee or those present

heard what was said by the appellant, and all they know as to the nature of the response made to appellee's inquiry is what was told them by the operator, who does not himself recollect what the response was. It is difficult to understand upon what principle this testimony is to be admitted. It cannot be said that the operator at Morgantown was the agent of Sullivan, the appellant, at Bowling Green, and for that reason his admissions are binding on the principal. Nor can it be said that he was the agent of Sullivan for the purpose of ascertaining what the contract was, but on the contrary he was the agent of the appellee. The latter wanted this agent to inquire of Sullivan, who doubtless did not even know him, why he had failed to take the hoop-poles on a named day, and the information was given him by Sullivan, as the latter admits. But this admission appellee says is untrue, because the agent of the appellee told other parties, not in the presence of Sullivan, that the reason you failed to come was that your man was sick. The agent don't recollect what the message was, but those present recollect what the agent said it was.

A telephone agent who makes an inquiry through the telephone for the benefit of and at the instance of another, is not made the agent of the party responding. The relation of principal and agent cannot arise farther than to admit the testimony of the operator as to what the conversation was. He will not be allowed to close his mouth, and others permitted to testify as to his statements of what passed between him and the party sought to be made liable.

The human voice, by means of this remarkable discovery, may be heard at almost any distance. It requires neither science or skill to use it as a means of conversation, and the result is that almost any one in the office may be called on to use it for others, and to establish the rule that the declarations of the one receiving the message as to the substance of the response made are evidence is subversive not only of a well recognised rule of evidence, but dangerous in its application.

The operator is not an interpreter in a legal sense. When persons of different nationalities are unable to understand each other they call on an interpreter, and he speaks for them—in their presence—those present hear his statements. This is original testimony, as much so as if the same witnesses were present and heard the parties themselves conversing with each other. There is no analogy between the case of an interpreter and that of a telephone

operator. Here the parties conversing are miles apart; the one is called to respond to the other; when Sullivan responds he is responding to Kuykendall, although through the agency of another. That operator can swear to what the statements were, but his declarations are no more competent than if Kuykendall himself had talked to Sullivan, and reported to others what Sullivan said. If the operator's statements are competent, so would Kuykendall's have been if he had made the inquiry and heard the response.

That one may constitute another, his agent, by telephone is not questioned, but that one who responds to an inquiry makes the party to whom he responds such an agent as that the latter's declarations are competent against him, I deny.

To illustrate the position assumed in this case, and leaving the telephone for a brief moment: the appellee sends the operator at Morgantown to Bowling Green to know of Sullivan why he failed to take the timbers. He makes the inquiry of Sullivan, and reports to those present in the room at the time that Sullivan told him it was because "Allen was sick." This Sullivan denies. Is it then competent for Kuykendall to prove by those present (the operator not recollecting) what report the operator made to them? If Sullivan heard what the operator said to the bystanders it would be competent, or if it could be inferred that he heard what was said it might be competent, but when you concede that he did not hear, as must have been the case when he was telephoned, it would be clearly incompetent. The operator would be as much the agent of Sullivan in the one case as in the other, but really not the agent in either instance.

Two merchants on one side of Main street propose to buy 100 barrels of pork from a merchant on the opposite side. The one directs his clerk to telephone the merchant on the opposite side of the street that he will give him ten dollars per barrel for the 100 barrels. The clerk telephones and reports the response to his principal and those present that the proposition is accepted. The other merchant, who has no telephone, directs his clerk to step to the door and call the merchant on the opposite side, making the same proposition. He does so and reports an acceptance of the proposition. The merchant refuses to deliver the pork in either instance, because he says he agreed to take twelve dollars per barrel, and this was his response, and he proves this to have been the response made by himself and those present. The two clerks fail to recollect what the response was, but it is offered in each instance to prove the report

made by the two clerks to their principal, and in this contradict the statements of those who heard the response. Is such testimony competent? It is certainly incompetent in one case and not competent in the other, unless the trade connected with this new discovery requires a department well recognised rule of evidence.

It is at last a question solely as to what the convicts. Those who heard it are competent witnesses, but the same to others as to what they heard are inadmissible.

Suppose Sullivan, instead of talking himself, his through the operator at Bowling Green, then the state operator at Morgantown, according to the principal of be competent to contradict the oath of the operator at Bowling Green as to the message sent by him. That this could the operator at Morgantown was called as a witness is not but his statements to others as to the conversation have been excluded. Nor can such testimony be admitted on ground that it was the best testimony the appellee, under the circumstances, could produce. Such a rule would open the door to hearsay testimony.

Such agents could easily be found willing to report information to others that they would not swear to themselves.

It is maintained, however, that this operator was acting within the scope of his authority, and therefore his statements are admissible. What was the scope of his authority? Statements of an agent for a special purpose admissible to the extent of his authority? If so it is a novel doctrine. If an agent may be permitted so as to presume general authority where the power is special and he departs from it, his statements are void. So if A. authorizes B. to tell C. that he will take them on a fixed day, and B. tells him that A. will take them on at that time, there being no other agency, he has no power to say A., and certainly his statements are not competent to the extent of the special agency.

The testimony is purely hearsay, and all the reasons for the consideration of both public and private interests for the character of testimony apply with great force to this case. I concur in the reversal of the judgment, I must dissent from much of the opinion as authorizes the admission of this

It is well settled that a *prima facie* presumption that a letter was duly received, arises, in the absence of evidence, from proof that

posited in the post-office properly addressed with the postage prepaid. This presumption is based on the probability that the officers of the government will do their duty, and that letters will be duly delivered: 1 Greenl. Ev., § 40, and cases cited; *Huntley v. Whittier*, 105 Mass. 391; *Briggs v. Hervey*, 130 Id. 187. This presumption is not a conclusive presumption: *Freeman v. Morey*, 45 Me. 50; *Greenfield Bank v. Crafts*, 4 Allen 451, 457; *First Nat. Bank v. McManigle*, 69 Penn. St. 159. In delivering the opinion of the court in *Huntley v. Whittier*, *supra*, GRAY, J., said: "The depositing of a letter in the post-office, addressed to a merchant at his place of business, is *prima facie* evidence that he received it in the ordinary course of the mails; and where there is no other evidence, the jury should be so instructed:" PARSONS, C. J., in *Munn v. Baldwin*, 6 Mass. 316, 317. PARKER, C. J., *Dana v. Kemble*, 19 Pick. 112, 114. GIBSON, C. J., in *Callan v. Gaylord*, 3 Watts 321; *Oaks v. Weller*, 16 Vt. 63; *Russell v. Buckley*, 4 R. I. 525; 1 Greenl. Ev., § 40; 1 Tayl. Ev. (5th ed.) § 147. The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty, and the usual course of business; and when it is opposed by evidence that the letter was never received, must be weighed with all the other circumstances of the case by the jury in determining the question whether the letter was actually received or not; and the burden of proving its receipt remains throughout upon the party who asserts it: *Crane v. Pratt*, 12 Gray 348; *Greenfield Bank v. Crafts*, 4 Allen 447.

A similar rule prevails as to telegraphic despatches: *United States v. Babcock*, 3 Dill. C. C. 571; *Com. v. Jeffries*, 7 Allen 563.

The decision of the first point of the principal case, appears, then, to be, beyond controversy, correct.

The second point involved in that case is one of more difficulty, concerning which we have found no decisive adjudicated cases. We have read the opinion of the majority of the court, and the dissenting opinion of Judge PAXTON, with great interest, as well as the cases referred to by the majority of the court in support of their conclusions; and from the best consideration we have been able to bestow upon the case, we are unable to coincide with the opinion of the majority of the court. The case does not seem to us to be analogous to that of an interpreter. In the case of an interpreter, the ground of the admissibility, as against both parties, of evidence of what he said is that he was the agent of *both* parties. If one were to instruct another to make a simple communication in a foreign language to a third party, to which no answer was given, no one would contend that such an interpreter was the agent of the party to whom the communication was made. In the case of an ordinary interpreter, the interpreter is authorized mutually to make communications and to receive and interpret answers thereto. The views above stated are sustained both by principle and authority. Mr. Greenleaf says: "The admissions of a third party are also receivable in evidence against the party who has *expressly* referred another to him for information in regard to an uncertain or disputed matter. In such cases the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself." 1 Greenl. Ev., § 182.

"This principle extends to the case of an interpreter, whose statements of what the party says are treated as identical with those of the party himself, and, therefore, may be proved by any person who heard them, without calling the interpreter:" 1 Gr. Eq., § 883. See, also, the cases of *Fabrigas v. Mostyn*, 20 How. St. Pr. 122, 123; *Camerlin v. Palmer Co.*, 10 Allen 539.

That the ground of the admissibility of such evidence is that of agency, is rendered more apparent from the fact that the rule does not apply to the case of an interpreter of a witness in a court of justice. Such an interpreter is not an agent of the party calling him, but rather an officer of the court; and evidence of what the interpreter testified on a former trial as having been received by him in a foreign language from a witness on such trial, cannot be given in evidence unless the interpreter be dead, insane, out of the jurisdiction, or sick and unable to testify, or having been subpoenaed, appears to have been kept away by the adverse party: *Scheerer v. Harber*, 36 Ind. 536.

The ground, then, of the admissibility of evidence of what was said by an interpreter, being agency, how could the appellant be understood to confer authority upon the operator at Morgantown to repeat his communication, when, so far as we can discover from the case, it does not appear that he even knew that he was conversing with appellee through a third person?

Passing the point as to interpreters, the majority of the court appear to have put their decision upon the simple ground of agency. As we have just stated, we are unable to understand how one can be held to confer authority upon an agent of whose existence he is not, so far as we can learn from the case, shown to have been aware. So far as we know, the general custom is for parties using a telephone, to use it in person; or, as

stated by the court in the case, "the parties talk with each other face to face;" and the fact that if the appellee was ignorant of the fact that he was talking to the person through whom he wished to communicate with the operator, or even any third person, it would not make it with the expectation of the appellant on his part, that in case he communicated with the one for whom the communication was intended, it would not make any difference to that person, is a pure fact vital to the determination of the case. Where one sends a verbal message to another person, and the answer, does the party sending the message the agent of the sender so that evidence of what was reported to his principal by any third person who heard it? If such is the case, business men to be careful not to rely upon more than written answers to communications. The case in question is exactly such a case, and it seems to us a plain application of the established rules of evidence. The dissenting opinion of Judge Harter, places the case in a different light and lays down the proposition that "a telephone agent inquiring through the telephone for the benefit of and at the instance of the appellant is not made the agent of the appellant by responding;" while the decision of the majority of the court is supported neither by principle nor authority. M

Chicago.

Supreme Court of Connecticut.

JERRY DARRIGAN v. THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.

A train dispatcher is not a fellow servant with the employees in a railroad company within the rule relieving the master from liability for injuries caused by the negligence of a fellow servant.

It is the duty of a railroad company to devise some suitable and safe method of running special and irregular trains, so as to avoid collision, and to

employed is to have the trains controlled by a train dispatcher, the latter as to employees in charge of trains stands in the place of the company.

The rules governing the liability of a master for injuries to his servant discussed.

IN error.

C. H. Briscoe and J. P. Andrews, for plaintiff in error.

S. E. Baldwin and E. D. Robbins, for defendant in error.

The opinion of the court was delivered by

CARPENTER, J.—On December 14th 1882, there were two special or irregular trains going in opposite directions on the western division of the defendants' single track railroad. These trains were run as directed by telegrams from the train dispatcher in the division superintendent's office at Hartford. The train going east was a construction train. About 12 o'clock it was at Southport station, where it received an order from the train dispatcher to run to Towantic as a special train ahead of No. 6, and then to work between Towantic and Waterbury as a special train until 6 o'clock P. M., protecting themselves against Globe special east after 1.30 P. M. The above order was given by the chief train dispatcher. Soon after he was relieved in the regular course of business by an assistant. A little before 5 o'clock the same afternoon, the plaintiff's train going west received at Waterbury from the assistant train dispatcher an order to run to Brewster's as a special. In obeying this order the two trains collided and the plaintiff was seriously injured. The court below rendered judgment for the plaintiff and the defendant appealed.

The negligence of the train dispatcher is admitted; but the defendant claimed that such negligence was the negligence of a fellow servant, for which it is not liable; and that is the first question presented for our consideration.

In *Wilson v. The Willimantic Linen Co.*, 50 Conn. 433, this court held that a master was bound to provide for his servant a reasonably safe place for his work and reasonably safe appliances. An application of that principle to a railroad company would require it to keep its road bed, rolling stock, tools and implements, in good and safe condition; to adopt rules and regulations adapted to its business, so as to guard against accidents; and to employ skillful and competent agents and employees in every department of its service. In short, all employers shall be vigilant in the use of

means and in the adoption of measures to make the servant employ reasonably safe. To that extent the master assumes the risk. On the other hand the servant assumes the natural risks incident to the business, including those arising from the negligence of his fellow servants. To a certain extent the distinction between the two classes of risks is obvious and it is easy to determine on which side of the dividing line it falls; but along the line on either side is a wide margin of doubtful ground. It would be idle to attempt to notice any number of the many cases that have been decided on this subject. They are so conflicting that it is impossible to reconcile them. It is equally impossible to extract from them any general principle by which future cases or any considerable portion of them may be determined. Differing views are entertained by the courts in similar cases. To some extent each case is governed by the peculiar circumstances attending it. Nor are the courts uniform in their statement of the principles upon which the exemption rests. In an early case the servants are represented as engaged in a joint undertaking, in which no one, as master or other, represents the master, and which each in his separate interest, does represent his principal, and in which each is responsible for the performance of his several part. Other cases place the ground that there is an implied contract by the servant to assume the risks arising from the negligence of his fellow servants. In still others it rests upon grounds of public policy. On whatever ground it is placed the practical difficulty remains—who are fellow servants and who represent the company?

In *Chicago, M. & St. P. Ry. Co. v. Rosa*, 24 American (N. S.) 94, the Supreme Court of the United States, in a unanimous opinion, held that the company was liable to an engineer injured by the negligence of the conductor. The court say: "There is, in this case, a clear distinction to be made in their relation to the company. The conductor is a common principal between servants of a corporation and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is of direction and superintendence. A conductor, having the control and management of a railway train, occupies a position from the brakeman, the porters, and other employees. He is, in fact, and should be treated as,

representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the company, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakeman, the porters and the engineer. The latter are fellow servants in the running of the train under his direction, who as to them and the train stands in the place of and represents the corporation." Then after citing several cases the court adds: "We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it starts, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible." We do not make these quotations as necessarily expressing our views upon a case like that, for the case at bar does not call for it, but for the purpose of showing the position of that court.

In *Sheehan v. N. Y. C. & H. R. Rd.*, 91 N. Y. 332, the facts were these: Train "337," an irregular or special train, called "Wild Cat," was going west from Auburn. Train "50" was a regular train going east from Cayuga. The latter was due at Cayuga at 4.40 P. M., and would go east at 4.45 by schedule. At 4.46 the superintendent telegraphed to "337," "Wild Cat to Cayuga regardless of No. 50." No notice was given to "50," and no rule of the

company required it, but the superintendent telegraphed to the telegraph operator at Cayuga to hold No. 50 for orders. The operator told the conductor to hold No. 50 for train No. 61. He neither exhibited nor delivered any message; no rule of the company required him to do either. No. 61 came in soon after and No. 50 started towards Auburn. In a few moments it collided with "337," and the plaintiff was injured. The court say: "It was not disputed at the trial, nor is it upon this appeal, that the dispatching of train 337—"Wild Cat"—and the holding of train "50," were within the province of the superintendent, nor that, in respect thereto, be represented the defendant in its corporate capacity. Clearly he held that relation.

The defendants' counsel in commenting upon that case, suggest that the case turned upon the defective nature of the general rules governing the movement of trains, which permitted the telegraph operator to deliver a train order verbally to the conductor. In respect to this, the court say: "The peremptory order of the superintendent to go forward regardless of No. 50 was an assurance that the track would be free and safe for the journey, and required the defendants to take reasonable precautions to make it so. The rules of the company did not require Kieffer, the telegraph operator, to submit the message received by him to the conductor or engineer of train No. 50, nor a communication back from these persons that they had received and understood the order; an omission of either circumstance was the act of the defendants and in the absence of other precautions might properly be held to constitute negligence." It is obvious that the court regarded the superintendent, who acted as train dispatcher, as the representative of the corporation, and his negligence was the negligence of the defendants. He failed to give an effective order to hold No. 50, which he might and should have done, regardless of rules. In that he, and through him the company was negligent. And none the less so that the company had failed to establish suitable rules. The intimation of the court is clear that the company was responsible on both grounds.

In *Chicago, Burlington & Quincy Rd. Co. v. McSallen*, 84 Ill. 109, the conductor of a special freight train received an order from the assistant superintendent directing him to run fifteen minutes behind the time of a regular freight train. In doing so he came in collision with a regular passenger train going in the opposite direction. The conductor was killed. No notice was given to

the passenger train. The company was held liable. The court say : "As between the conductor and company, the assistant superintendent, to whose orders the trains are all subject, is the representative of the corporation. His orders to the conductor of a train are essentially the orders of the employer. This rule applies as well to all orders issued by his assistants in office and issued in his name. These orders were all signed in the name of Campbell, the assistant superintendent. If those intrusted by him with the arrangement of the business of the corporation, by orders issued in his name, neglect to issue a necessary order, that is his neglect and the negligence of the corporation."

In Kansas, in a similar case, the court say : "And those higher officers, agents or servants cannot, with any degree of propriety, be termed fellow servants with the other employees who do not possess any such extensive powers and who have no choice but to obey such superior officers, agents or servants. Such officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, and, in fact, to be the principal." It is conceded by the defendant's counsel that in Ohio, Illinois, Tennessee and Kentucky, the law is substantially as indicated by the authorities above referred to.

On the other hand it must be conceded that the cases above named and others of like import, are a departure from the general current of authorities elsewhere. A conductor and brakeman have been held to be fellow-servants in Indiana and Michigan : *Thayer v. St. Louis, &c., Ry. Co.*, 22 Ind. 26; *Smith v. ——— Ry. Co.*, 46 Mich. 258. So also an overseer and a laborer under his charge. *Brown v. Winona, &c., Ry. Co.*, 27 Minn. 162; and a foreman and workman under him. *Keystone Bridge Co. v. Newbury*, 96 Penn. St. 246; *Daubert v. Pickel*, 4 Mo. App. 591; *Hath v. Peters*, 55 Wis. 405; *Peterson v. Coal & Mining Co.*, 50 Iowa 674. In Massachusetts they have pretty rigidly adhered to the doctrine of the leading case of *Farwell v. Boston & Worcester Rd. Co.*, 4 Met. 49. In one case there was an apparent weakening; *Ford v. Fitchburg Railroad Co.*, 110 Mass. 260; but the court soon took pains to prevent that case from being regarded as a departure from the general rule. *Holden v. Fitchburg Railroad Co.*, 129 Mass. 268. In that case GRAY, C. J., says, "If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and

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taking due precautions as to their use, he is not responsible as a servant for the negligence of another in the management of such structures and engines in carrying on the work. In another place he adds: "And it makes no difference whether the servant whose negligence causes the injury, is a sub-manager or a man of higher grade, or greater authority than the plaintiff."

In *Feltham v. England, L. R.*, 2 Q. B. 33, it is said that the exemption is not altered by the fact that the servant whose negligence is a servant of superior authority, whose negligence the other is bound to obey.

In *Wilson v. Merry, &c., L. R.*, 1 H. L. Scotch App. Lord Chancellor says: "But what the master is, in relation to his servant, is bound to his servant to do, in the event of his not performing the work, is to select proper persons to do so, and to furnish them with adequate resources for the work. When he has done this in his opinion, done all that he is bound to do."

It seems to us that the rule prevailing in Massachusetts which did prevail in England previous to the passage of the Employers' Liability Act, hereinafter referred to, unduly exempts and confines the liability of employers within narrow limits. If such a rule had been followed in *Wilson v. Linen Co., supra*, the decision must have been otherwise. The rule, we think, does not sufficiently recognize the distinction between agents, managers, and even superintendents on the one hand, and mere servants and common laborers on the other—between those to whom the master is required to perform and work which are performed by employees. It makes little allowance for the fact that the master does not sufficiently regard the obvious fact that the master is constantly arising, especially in the operation of railroads, where a general rule can provide for, in which the master must be as constructively present, in which some one must be given a discretion and a right to speak and command in his name, and in his authority. Such a right carries with it the corresponding duty of obedience; some one must hear and obey.

To make no discrimination, but in all cases to place the master and his agents and superintendents with authority to direct and control on the one hand, and to give to those whose duty it is merely to perform as subordinates, without discretion and without responsibility, seems to us to be impolitic.

The duties of a master in most cases are easily distinguished from those of an employee. The proprietor of a cotton mill is bound to have a safe building, a safe dam or engine, and safe machinery; and he is bound to keep them so. To do that he must employ skilled mechanics, who perform his duties. Their negligence is his negligence. The English rule says that he has done his whole duty when he has employed skilful, careful men to do this work. We think that a more salutary rule would be to require him to see that the work is actually done with care and skill; to require him to inspect the work personally if competent, and if not, to employ others who are, and who will exercise more than ordinary care, so as to make it reasonably certain that the operatives will be surrounded by safe machinery and appliances. The liability of the master for the negligence of such agents is a surer guarantee of safety than immunity.

The diligence required will be the greater as the danger and hazards increase. The operation of a railroad requires a greater degree of care than the operation of a cotton mill. It is the duty of a railroad corporation to prepare a time-table and adjust the running of its trains so as to avoid collisions. It must also devise some suitable and safe method by which to run special and irregular trains, and regular trains when off their regular time. That cannot be done by general rules. Emergencies will arise which no system of rules can anticipate and provide for, in which the company must act and act promptly and efficiently. In this case the scheme devised was to have these trains controlled by one who knew the position and movement of every train on the road liable to be affected by them—a train dispatcher, acting in the name and by the authority of the superintendent. Is there not a wide and manifest difference between the duty of such an agent and the duty of a locomotive engineer? The duty of the former pertains to management and direction; that of the latter to obedience. It is immaterial that these men are hired and paid by a common employer, and that their employment is designed to accomplish one common result. That argument, if pressed to its logical conclusion, would obliterate all distinctions among those engaged in railroad business, from the president down to the humblest servant, and would practically exempt the company from all duty and all liability to those in its service.

A reference to the rules of the company in connection with the

facts will serve to show that the views above expressible to this case. Here were two irregular trains to opposite directions on a single track railroad so as to pass each other. It was necessary that their movements should be regulated by instructions emanating from some one intelligent officer. The rules of the company provide for moving trains by signal. One rule is, "All orders shall be given by a superintendent or a dispatcher appointed for that purpose, under the direction of the superintendent; no other person will be allowed to give orders." Another rule is, "Division superintendents are supreme in their respective divisions, and are responsible only to the general superintendent for such orders as they may give." The following is the finding of the court: "So far as the printed rules and regulations of the company did not govern, the train dispatcher was authorized to give such orders for the movement and protection of the trains as he saw fit, and while so acting he had all the authority of a superintendent in the stead and place of, the division superintendent."

The train-dispatcher then, in respect to the matter of these trains, was supreme. The whole power of the company in this respect, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and for its benefit. The engineer was bound to obey his order. Disobedience would have been subversive of orders and discipline, and dangerous in its consequences, and just cause for immediate dismissal. He received an order to go west from Waterbury on a single track road at a time when another train was approaching Waterbury from the west. The order was imperative and it required absolute obedience. He obeyed. He did not then know of the existence of the other train, but the company did or should have known. He obeyed the order, as he was bound to; and while so conforming to the order, the direct consequence thereof, he was injured. Reason and law require that the company should be held responsible.

Another rule provides that "in emergencies each employee shall promptly obey the orders of any superior officer." It is the duty of the company to make the order of that officer, whoever he may be, and of whatever grade he may be, its own. If the order is a proper one, and, in executing it, another employee is injured, the company should be responsible. In such a case the negligence of the employee becomes and is material.

That rule too, in its spirit had an application to the case. There was something in the nature of an emergency. There was no room for divided counsels; there must be unity of purpose and one mind must control. That power and duty devolved upon the train dispatcher.

It is worthy of notice that the principles which we think should govern this case have been embodied in an act of Parliament, and are now the law of England. The decisions of her courts on this question have been overruled by statute. In 1880, the "Employers' Liability Act" was passed, which is chap. 42, 43, 44 Victoria, the first section of which is as follows: "When after the commencement of this act personal injury is caused to a workman (1) By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the service of such superintendence; or (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, when such injury resulted from his having so conformed; or (4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer; or (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine or train upon a railway. The workman, or, in case the injury results in death, the legal personal representative of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

The act limits the amount to be recovered in certain cases; and will cease to be operative at the end of seven years unless re-enacted.

Among the rules of the company which had been placed in the plaintiff's hands is the following; "The regular compensation of employees covers all risk or liability to accident." The record does not show that the defendant claimed in the court below that this was equivalent to a contract exempting it from liability for its own negligence, nor do the reasons of appeal present any such question. When such a question is presented we may be called upon to con-

sider whether public policy will permit a railroad company to make such a contract with its employees.

A new trial is not ordered.

The common law regulating the liability of masters for injuries received by servants in the course of their service, is thus stated by Chief Justice SHAW of Massachusetts, in a case which has the distinction of being cited as a leading one in England as well as in America: *Farwell v. Boston & Worcester Rd.*, 4 Metcalf 49. (See also, Whart. on Neg., § 199; Thompson on Neg. 969; *Totten v. Penna. Rd.*, 11 Fed. Rep. 564.) "He who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment." Further on the chief justice says: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the safety of the whole party may require."

Certain limitations of this law must be noticed. The master must take care to provide good servants and suitable tools if he would avoid liability, but it is only reasonable care that the law exacts; the master is not an insurer.

For instance, machinery need not be fitted with the latest appliances if it is strong and safe with ordinary care:

2 Thompson on Neg. 982-3; *A. T. & S. F. Rd. v. Hol.*, 29 Kans. 149; *M. C. Rd. v. Smithson*, 45 Mich. 212; *L. S. & M. S. Rd. v. McCormick*, 74 Ind. 440. It is even the doctrine of some courts that the master is bound rather to good faith than to care, and so may use defective machinery provided the workman knows its condition: *Hayden v. Mfg. Co.*, 29 Conn. 548. *Contra*, *Kain v. Smith*, 89 N. Y. 375. More care is required of the employer where a child is concerned than in the case of an adult hand: *Cooley on Torts* 553; 2 Thompson on Neg. 977. If the master directs work in person he is answerable for the consequences of ordering hands into positions of unusual danger: *Miller v. U. P. Rd.*, 17 Fed. Rep. 67; 2 Thompson on Neg. 974. If he turns over the whole ordering of the work to a superintendent, then by the law of agency the deputy stands in his principal's place.

But on the further point whether a deputy clothed with partial authority only—a foreman or upper servant—stands in the master's place, a decided change is taking place from the old rule that a foreman is a fellow-servant with others, and the master is, therefore, not liable for his negligence. Almost all the many decisions on this subject are railroad cases, where the question is the responsibility of the company for the negligence of such subordinate officials as track-masters, train-despatchers, conductors, engineers. It is impossible, here, to take up the examination of the law of every state. Suffice it to say that the western and southern states have, most of them, departed from the old rule. As the principal case indicates, so has Connecticut. So, in a measure, has New York. Pennsylvania keeps on the whole to the old law, to which Massachusetts

stoutly adheres: *Malone v. Hathaway*, 64 N. Y. 5; *Coal Co. v. Jones*, 86 Penn. St. 438. But see *Mullen v. P. S. Co.*, 78 Id. 25; *Holden v. Rd.*, 129 Mass. 268.

It was said by the Supreme Court of North Carolina, in a recent review of the authorities, that no definition of the term "fellow-servant," applicable to all cases, had yet been adopted by the courts, and probably could not be. So variant were the relations between master and servants in different employments, and so close the line of demarcation between co-laborers and middlemen, that each case would have to stand upon its own facts: *Dobbin v. Rd.*, 81 N. C. 446. Thus, also, it has been decided that whether parties were fellow-servants was a question for a jury: *I. & St. L. Rd. v. Morgenstern* (Ill.), 12 Am. & Eng. Rd. Cases 228. A principle upon which the change in the law is based, and with which, certainly, no fault can be found, is that when the master delegates any duty which belongs to himself, he is liable for its proper performance: *Hannibal & St. Joseph Rd. v. Fox* (Kans.), 15 Am. & Eng. Rd. Cases 325.

Starting with this principle, one way of determining the line between a deputy and a mere servant is by the ruling that it is the absolute duty of the master to provide proper instrumentalities for the conduct of the business, and if he commits this duty to a deputy, the master is nevertheless liable for its performance. This rule is well illustrated by two Minnesota cases: *Drynala v. Thompson*, 26 Minn. 40; *Brown v. Rd.*, 15 Am. & Eng. Rd. Cases (Minn.) 333. In the first of these a train had been hurt by cars being thrown from the track where the section-master, in repairing, had taken up a rail and had omitted to send out signals to warn approaching trains. "Here," said the court, in effect, "the track is an instrumentality necessary to the working of the road which it is the

master's absolute and personal duty to keep in repair, and as the company delegated this duty to the track-master, it is answerable to an employee for his neglect." In the other case a train ran into some cars which had been left standing upon the main track at a station, contrary to rule, and the engineer was injured. The fault was that of the station agent, who had charge of the station and the tracks about it. The court said, in substance, after referring to the previous case: "Here was an improper use of proper instrumentalities, and for this the company ought not to be held liable. Nor had the station agent any general superintendence of a branch of the business."

It is perhaps on this ground that it is generally held that servants in charge of the construction and repair of machinery are vice-principals: *H. & T. C. Rd. v. Marcelles*, 12 Am. & Eng. Rd. Cases 231; *Hough v. Rd.*, 100 U. S. 213.

Another mode of determining the line between a deputy and a mere servant, is by ruling that the master is liable if the negligent servant is in charge of some department of the master's business. But this "being in charge" must be more than a mere right to oversee hands or direct work; it must be more than getting higher pay, or holding a position of special skill. Not the relative grade, but the nature of the duty, makes the difference. There must be some responsibility, some "control or superior authority over another" (McCrary, J., charging jury, *Gravelle v. Rd.*, 3 McCrary 363), so as to put the deputy *pro tanto* in the master's place: *Fraker v. Rd.* (Minn.) 15 Am. & Eng. Rd. Cases 256; *N. C. & St. L. Rd. v. Wheless*, 10 Lea (Tenn.) 741, 15 Am. & Eng. Rd. Cases, 315; *C. & A. Rd. v. May*, (Ill.) Id. 320.

Thus, a railroad road-master—an officer usually considered a vice-principal—has been held not a vice-principal

when he was acting for the occasion as a mere foreman of a gang of laborers: *Hoke v. Rd.*, 11 Mo. App. 574.

The decision of the Supreme Court of the United States, in *C. & M. & St. P. Rd. v. Ross*, 24 Am. L. Reg. (N. S.) 94, cited in the principal case, though by a divided court—Justices MATTHEWS, GRAY, BRADY and BLATCHFORD, dissenting—may mark a turning point in the law. The facts are these: The conductor of a freight train received a telegram to lay over at a certain station to allow a special train to pass. Instead of notifying the engineer at once, as the rules required, the conductor went into the caboose and went to sleep. The train did not stop at the station, collided with the special, and the engineer was killed. The company was held liable. See also, *Moon v. Rd.*, Ct. of App. of Va., 20 Cent. L. J. 33.

A third and very common test for determining the line between vice-principal and servant is, *whether the party has power to employ and discharge hands*. This is sometimes regarded as an absolute test, and sometimes as an element to be considered in the case: *T. M. Rd. v. Whitmore*, 58 Tex. 276; *Tyson v. Rd.*, 61 Ala. 554; *C. & A. Rd. v. May* (Ill.), 15 Am. & Eng. Rd. Cas. 320, and note; *Henry v. Brady*, 9 Daly (N. Y.) 143. See also, *Rd. v. Decker*, 82 Penn. St. 119.

All three of the foregoing rules for distinguishing between vice-principal and servant, are illustrated in a late Wisconsin case: *Peachel v. C. M. & St. P. Ry.* (Nov. 1884), 21 N. W. Rep. 269. The plaintiff was injured while engaged with other mechanics and laborers, under a foreman, in putting up a water-tank and wind-mill. A post, called the anchor-post, had not been set deep enough in the ground and gave way, letting the hoisting tackle fall upon the plaintiff. The foreman in charge of the work had no general power to employ and discharge hands, though au-

thorized, in certain cases, to discharge a man who did not give satisfaction and employ another. The foreman was himself under the orders of a master-carpenter. It was held that the action came not from defective machinery, for which the master would be blamable, but from a faulty setting in place of machinery good in itself, which was the fault of the servants engaged in the work. It was also held that the foreman was a fellow-servant of the injured party.

It has been held that a delegation of authority will more readily be inferred where the master is a corporation, but it is not easy to deduce any rule on this point, because there are so few cases where the master is *not* a corporation. In England no such distinction is admitted: *Thompson on Neg.* 1031, and note; *Brickner v. Rd.*, 49 N. Y. 672; *Patterson v. Rd.*, 76 Penn. St. 389; *Malone v. Hathaway*, 64 N. Y. 5; *Hewells v. Steel Co.*, L. R., 10 Q. B. 62.

In addition to the inquiry, who is to be deemed a vice-principal? the law is in a transition state as to the question, when are workmen in a common employment? The general rule laid down by Chief Justice SHAW, that they are in a common employment who serve and are paid by the same master, and aid in carrying out the same enterprise (*Thompson on Neg.* 1026), has been departed from in some states where it is held, those only are in a common employment who may actually overlook each other's work: *Rd. v. Jones*, 9 Heisk. (Tenn.) 27; *McGowan v. Rd.*, 61 Mo. 528; *Smith v. Potter*, 46 Mich. 258; *Rd. v. Morgenstern*, 106 Ill. 216. It has been said to be the law in the federal courts that common employment means the same department of duty: *GRESHAM, J.*, in *King v. O. & M. Rd.*, 11 Bissell 362.

We are now prepared to look at the statutory changes in the law.

The fullest and most complete statute, the English Employers' Liability Act of

1880 (43 & 44 Vict. c. 42), provides that workmen, or their representatives, shall have an action against their employers (which includes associations, corporate or incorporate,) for injuries or death happening:

1. By reason of defects in "ways, works, machinery, or plant," arising from the employer's negligence, unless the workman knew of the defect and failed to give notice of it.

2. By reason of the negligence of any one having superintendence entrusted to him; or

3. By reason of the negligence of any person to whose orders the workman was bound to conform.

4. By reason of bad rules and regulations; but none shall be had which have been approved by the proper department of government.

5. By reason of the negligence of any employee having "charge or control of any signal, points, locomotive engine, or train upon a railway."

The compensation to be recovered may not exceed the estimated earnings for three years previous, of workmen in like employment and in the same district, as the injured person. Notice of the injury must be given to the employer within six weeks, and suit begun within six months, or in case of death within twelve months, except that in cases of death the judge may excuse the lack of notice if he see fit. The act applies to railway servants and also to any "laborer, servant in husbandry, journeyman-artificer, or otherwise engaged in manual labor." By a hard though possibly accurate interpretation of these words, an omnibus conductor whose business it was to look out for passengers and take fares, was held not "engaged in manual labor": *Morgan v. Omnibus Co.*, L. R., 13 Q. B. Div. 832.

According to English law the employer must provide proper and safe machinery, but the cases are not uniform on the point whether if the employed

knows the machinery unsafe and makes no complaint, he may hold the employer liable. We can come nearest to reconciling the decisions by saying with LORD COCKBURN, not very definitely, it must be admitted: "That the risks necessarily involved in the service must not be aggravated by any omission on the part of the master, to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect it would be kept:" *Clarke v. Holmes*, 7 H. & N. 937, Whart. on Neg. 210. See also *Dynen v. Leach*, 26 L. J. Ex. 221; *Assop v. Yates*, 2 H. & N. 767; *Weems v. Mathieson*, 4 Macqueen H. L. Cas. 215. But now the Employers' Liability Act settles it, and as we think rightly, that an employer is liable for defects in apparatus which he knows, or ought to know of; for a man cannot contract that he shall not be responsible for his own neglect, nor is the negligence of an employer a risk incident to his servant's employment. Thus, a case arose under the act, where a man had been killed by a lump of coke falling upon him from a lift under which he was standing. The sides of the lift ought to have been fenced in. It was argued that the word "defect" did not mean unfitness for the purposes to which it was applied of a machine perfect as far as it went, but the court said that if a machine was not suitable for the purposes it was used for, of course it was defective: *Heske v. Samuelson*, L. R., 12 Q. B. 30. A "defect in condition of ways" means a defect in the way itself; not an obstruction lying in it: *McGiffin v. Shipbuilding Co.*, L. R., 10 Q. B. Div. 1.

In making the master responsible for the negligence of his superintendent, and for bad rules and regulations, the Employers' Liability Act is declaratory of the existing law, but it introduces a material change when it makes the employer answerable for the negligence of

any one, "to whose orders the workman was bound to conform." Hitherto the English law on this point has been the stricter rule that a deputy's negligence is chargeable upon the principal only when the delegation of authority is total, not partial nor over a certain department of work: *Murphy v. Smith*, 19 C. B. N. S. 361; *Conway v. Belfast, &c., Ry.*, 11 Ir. R. C. L. 345.

This portion of the act also has been construed: One may be superintendent although he occasionally assists in manual labor, while on the other hand a man whose duty it was to manage a guy-rope on a crane and give directions when to hoist and lower, has been held not a superintendent. Again, when a foreman induced a boy by the promise of extra pay to do work which by a known rule of the employer was forbidden to boys, it was held that, in the circumstances, the order was not one to which the boy was bound to conform: *Osborne v. Jackson*, L. R., 11 Q. B. Div. 619; *Shaffers v. General Steam Nav. Co.*, L. R., 10 Id. 357; *Bunker v. Midland Ry. Co.*, 47 L. Times 476.

Another and a radical change in the law is wrought by the section of the act which gives an action against the employer where an employee is killed or injured by the negligence of a fellow-workman in charge or control of any railway signals, trains, and so forth. This provision abolishing the defence of common employment, as far as certain classes of railroad workmen are concerned, has been interpreted with some exactness. A man having charge of a set of trucks run by a hydraulic engine along a line of railway, was held to have "charge of a train." A nice distinction was made in another case: A man who worked under an inspector, and whose business it was to clean and oil switches and signals, after oiling some switch gear, left the cover of the box which enclosed the gear projecting over the track, so that a train was thrown off the rails.

It was decided that as his business was only to oil and clean, he had not control within the meaning of the act: *Cor v. G. W. Ry. Co.*, L. R., 9 Q. B. Div. 106; *Gibbs v. G. W. Ry. Co.*, 11 Id. 22. The act includes a temporary railroad laid down by a contractor: *Doughty v. Firbank*, 10 Q. B. Div. 358. (A steam crane fixed on a car is not a locomotive: *Murphy v. Wilson*, 52 L. J., Q. B. 524.)

Coming to this country, we find that in Georgia a railroad is liable to one employee for the negligence of another, when the injured person is not chargeable with contributory negligence. Wisconsin has a similar statute: Code of Georgia, §§ 2083, 2203, 3033, 3036; *Baker v. W. & A. Rd.*, 68 Ga. 699; R. Stat. Wis. § 1816, *Gunn v. C. M. & St. P. Ry.*, 52 Wis. 672. (This statute not class legislation: *Ditberner v. C. M. & St. P. Ry.*, 47 Wis. 138.) Statutes in Iowa and Kansas apply only to persons operating railroads; not to other railroad employees. This construction was put upon the Iowa statute, and also upon the Kansas statute copied from it, that they might not be open to the constitutional objection of partial and class legislation. McClain's Dig. (Iowa) p. 357; Compiled Laws of Kansas 1879, p. 784; *Depps v. Rd.*, 36 Iowa 52; *Mo. Pac. Ry. v. Haley*, 25 Kans. 35.

Accordingly, opening and closing the doors of a round-house has been pronounced not connected with the operation of a railroad; nor is a section-hand loading a car within the benefits of the act, although he would be when going over the line on a hand-car: *Malone v. Rd.*, 11 Am. & Eng. Rd. Cas. 165; *Smith v. Rd.*, 59 Iowa 73; *Frandsen v. Rd.*, 36 Id. 372.

In certain states (Maine, Mississippi, Missouri, West Virginia, Colorado), statutes giving to "any person" injured the right to sue the railroad company, do not extend to employees. In Kentucky it is otherwise: *Carle v.*

Bangor, &c., Rd., 43 Maine 269; *Rd. v. Hughes*, 49 Miss. 258; *Proctor v. Rd.*, 64 Mo. 112; *A. T. & S. F. Ry. v. Farrow* 6 Col. 498; *Randall v. B. & O. Rd.*, S. C. U. S., 15 Am. & Eng. Rd. Cas. 243; *McLeod v. Ginther*, 80 Ky. 399. A Massachusetts statute prevents employers evading by contract any liability which otherwise they might be subject to, but imposes no new liability: Mass. Gen. Stat. 1882, p. 422. Under the English act, workman may contract not to claim compensation: *Griffiths v. Dudley*, L. R., 9 Q. B. 357.

We pass over the statutes in both countries which establish regulations for the government of mines and factories, and make the owner answerable to his employees for the disregard of these regulations, because such statutes only define the employer's negligence, and introduce no new principles of law.

In studying the English Employers' Liability Act, one cannot but be struck with the evidences of care and attention it displays. The act is careful to define the terms it uses. By limiting the compensation which injured parties can recover, the plundering of employers through the prejudices and sympathies of juries is prevented. By the requirement that timely notice of injury sustained shall be sent to the employer, he is enabled to know what he is sued for, and need not fear lest all manner of swindling actions be sprung upon him. How much calling of witnesses and wrangling of counsel will that clause of the act dispense with, by which all rules and regulations of employers are considered good which have the approval of government.

Our own statutes are most of them short articles or parts of articles in codes, and seem to be due rather to impulse than to any thorough examination of the law of master and servant.

It has no doubt been observed by the reader, that all the American statutes apply only to railroad employees, and

that the English act makes its most decided change in the law in favor of the same class. This no doubt proceeds from the fact that there is no other employment in which so great a number of men are, at once, in such danger from the carelessness of others, and so powerless to provide against it. But to make the change in the law impartial and thorough, the right to recover ought to be extended to persons engaged in other employments, who are exposed to unusual risks from their fellow servants, which they cannot guard against. In *Hoth v. Peters*, 55 Wis. 405, the plaintiff, a workman in a lumber yard, was on a car piling lumber, and was injured by the starting of the car. The employer was held not liable. If the plaintiff had been a railroad employee, doing the very same work, no doubt he would have recovered damages.

The ground upon which the changes in the law which we have been surveying must stand, we take to be the weakness of the defence of common employment, when it rests upon an assumption of law, and not upon ascertained facts. The circumstances of many, if not most cases, make it absurd to pretend that the injured party could have insured his safety by watching others in the same service.

Take, as an example, the leading case quoted at the beginning of this paper, that of an engineer hurt by the carelessness of a switch-tender. If the law is to remain unchanged, let it be upon the ground that the servant assumes the risks incident to his employment, a conclusion which though it may sometimes bear hard, is reasonable enough.

Never was it more important than it is now, when the tendency in every department of thought is to pass authority by, and search into the causes of things, that the law should commend itself to the plain sense of men in its reasonings as well as its rules.

CHARLES CHAUNCEY SAVAGE.
Philadelphia.

The Supreme Court of New York.

KINGMAN v. FRANK.

Where a married woman, having a separate estate or business, employs her husband to manage the same, and agrees to pay him a stated compensation for his services, a chose in action in his favor against her is created, which, on her failure to pay, can be reached by a judgment creditor of the husband.

APPEAL from a judgment entered upon an order sustaining a demurrer to a complaint.

DANIELS, J., delivered the opinion of the court.

This suit was brought by the plaintiff as a judgment creditor of the defendant Gustave Frank, after the issuing and return of an execution unsatisfied against his property. The only property which it was alleged he had that was applicable to the payment of the judgment, was a debt of \$1040 owing to him from his wife. This debt was alleged to have arisen for services performed by him in her employment, under an agreement by which she agreed to employ him to manage and superintend a separate business carried on by her as a dealer in dry goods and notions, for which she agreed to pay him eight dollars a week. It is further alleged that he entered upon the performance of the agreement, and continued under it in her service until the alleged indebtedness had accrued in his favor.

The demurrer was served upon the alleged ground that these facts did not constitute a cause of action, and it was sustained by the court for the reason that the husband himself could not enforce the payment of his salary by an action against his wife.

That she should employ him as she did to perform services for her in her separate business, resulted from the statutory provision empowering her to carry it on the same as though she was an unmarried woman, and the existence of that power of employment derived from this statutory authority has already received the sanction of the courts: *Fairbanks v. Mothersell*, 60 Barb. 406; *Abbey v. Deyo*, 44 N. Y. 343; *Foster v. Persch*, 68 Id. 400.

As she could enter into a lawful contract for the employment of her husband in this manner, and has been required by the statute to be considered as a *feme sole* in the exercise of the authority conferred upon her, it would seem to follow that she could obligate and bind herself for the payment of the stipulated compensation. From the facts made to appear, the sum of money alleged in the complaint, has

been earned by him, and become payable from her for the performance of his services under a lawful agreement entered into by her, and it is to be presumed in support of the plaintiff's action that she would be willing to pay over the amount voluntarily to him in satisfaction of his demand against her husband, as soon as the legal right to receive payment shall be acquired in these proceedings from her husband. Certainly the court has no ground to assume, and for that reason to defeat the action, that she would not honestly and fairly perform her contract by payment of the money as soon as the plaintiff shall be placed in a position where he would have a legal right to receive it.

But it will not follow from the inability of the husband to collect the debt by means of legal proceedings, that the plaintiff would be prevented from doing so by reason of the same disability, if it should be considered to exist. For this disability would extend no further than to affect the remedy, and would not stand in the way of the plaintiff to recover the debt, or of a receiver appointed for that purpose under a proper judgment of this court. To warrant such a recovery all that would seem to be necessary is an obligation on the part of the wife to pay the money, and that obligation has been created by her contract and the performance of her husband's services under it. These facts together with the acquisition of the demand by the plaintiff, or by a receiver in the action, would be all that could be legally required to maintain an action for the recovery of the debt. In this respect the case would resemble that of a foreign executor or administrator who while he could not maintain an action in this state to recover a demand due to the testator or intestate might still assign it to another person, who could upon the title so acquired, successfully prosecute such an action. And that an assignee might in like manner recover this demand would seem to follow from the principle of *Fitch v. Rathbone*, 61 N. Y. 576. For if the assignee of the wife may maintain an action against her husband for the conversion of her property, it would seem to follow that the assignee of the husband might also maintain an action against the wife to recover the amount of an indebtedness she had lawfully incurred to her husband.

The case of *Perkins v. Perkins*, 2 Barb. 561, when its circumstances are considered, will not appear to be an authority sustaining the conclusion arrived at by the special term. The other authorities as well as the result of the statute to which reference has been

made, appear to be sufficient to enable the plaintiff to maintain this action, and to obtain satisfaction of his demand out of the legal obligation created against the wife in favor of her husband.

The judgment should be reversed with costs, and judgment should be directed for the plaintiff on the demurrer, with leave to the defendants to withdraw the demurrer and answer in twenty days on payment of the costs of the demurrer and of this appeal.

DAVIS, P. J., and BRADY, J., concur.

The capacity of a married woman to have and to deal with her separate estate, and to contract, and to trade and do business, comes from the equity doctrine, and the respective state statutes; yet the question involved in the foregoing case, is of general application, and not limited by statutory restrictions.

In the above case it was held that the husband's wages, due from his wife for his services under contract in her separate business, are subject to his debts. But the question of general interest is whether or not the husband's creditors can reach the fruits, products or results of his labor, skill and industry, created in the conduct or management of his wife's business or estate.

As a rule, this product or result is first his wages, or compensation, when it is agreed that he shall receive compensation, or secondly, it is the benefits, increase or profits, which his wife's separate estate or business receives from that labor and skill, when there is no such agreement for compensation.

In the former case the benefits from the husband's labor and skill accrue to the husband, and in the latter case, to the wife. In the former case, it is based on agreement for compensation, and in the latter it is not. The courts hold, that in the former case the product of the husband's labor and skill, to wit: his wages or compensation are *subject to his debts*, and in the latter case, such product to wit: 1. When his labor is bestowed gratuitously on her separate estate or in her business. 2. When there is no

agreement for compensation; and 3, when he gratuitously makes improvements upon her separate estate, are *not subject to his debts*.

In any case, the subject-matter and the thing which the husband's creditors want, is the fruit, product or result, of the husband's labor. Because one is *not* gratuitous the product is liable, and because the other is gratuitous, such product is *not* liable.

It is not gratuitous when it is agreed that he receive compensation for his labor, and it is gratuitous when there is no agreement for compensation for his labor, or for his improvements on her property.

The husband's creditors want this product, or result, or fruit of the husband's labor, no matter under what form it may appear. If they can reach it when it is in the form of an agreement for compensation, there can be no logical reason why they should be prevented from reaching it when not produced under the form of such agreement.

In consequence of the great contrariety of the opinions, and the unsatisfactory condition of the reasons adduced, all the decisions are here reviewed, and they seem to settle the following: 1st. That the husband's wages or compensation is liable. 2d. When he works without any agreement as to compensation, the product or fruits of his labor and skill are not liable. 3d. When he voluntarily places improvements or repairs on her separate property, such improvements or repairs, cannot be touched by his creditors.

The first is settled as stated, by the weight of authority.

With respect to the second, Mr. Bump, (*Fraudulent Conveyance* 269), states that the conclusions deducible from the decisions are that the law will not compel a debtor to earn money to pay his debts; hence he can labor or not. If he labor he can limit his earnings to actual subsistence, or to the support of himself and family. He is under no legal or moral obligation to appropriate his earnings to the benefit of his creditors, and leave himself and family to suffer from hunger and want; and after a contract has been partially performed, he may refuse to complete it, and a new arrangement may be made for the purpose of protecting his subsequent earnings; but he cannot make an assignment of his future earnings with the intent to delay, hinder or defraud his creditors. But beyond the necessary wants of himself and family, there is a limit which the law does not allow him to transcend. He is not permitted to treasure up a fund accruing from his labor or vocation, whatever it may be, and claim that it shall be protected for the benefit of himself and family against the demand of creditors. Every agreement or contrivance entered into with a view to deprive his creditors of his future earnings, and enable him to retain and use them for his own benefit and advantage, or to make a permanent provision for his family, is fraudulent and void. Although his creditors cannot compel him to labor for the purpose of satisfying their demands, yet they have a just claim in law upon the *fruits of his labor*. The law does not permit him to carry on a business in the name of his wife, so as to invest the proceeds of his skill and labor in her name. If she has a separate estate, she may employ him and compensate him for his services, but the employment must be in good faith and not merely colorable. If the character of an agent is assumed in an improper case, the law disregards it.

An arrangement by which the husband acts as his wife's agent, without any compensation or for an insufficient compensation is, in effect, an attempt to make a voluntary conveyance of the products of his skill and labor in her favor, and is void against his creditors. She is entitled to her money with interest, and the balance will be appropriated to the payment of his debts."

These deductions are not wholly satisfactory, nor entirely accurate, nor fully in accord with the cases cited. The ruling in *Leslie v. Joyner*, 2 Head 514, was based upon that in *Hamilton v. Zimmerman*, 5 Sneed 39, where the court stated that whilst the husband is under a positive obligation in law and morals to support his wife and family, "he cannot make it the pretext for covering up and protecting from the just claims of creditors any surplus fund accruing from his labor or vocation, whatever it may be." *Griffin v. Cranston*, 1 Bosw. 281, held valid an agreement of an insolvent to work for his board, unless future profits were earned in consideration of an assignment where the assets were not sufficient to pay his debts. In *Holdship v. Patterson*, 7 Watts 547, the court held valid the husband's agreement to work for the subsistence of his family, and that such products or results of his labor were not subject to the payment of his debts; stating that the husband was "at liberty to dispose of his services for his own purposes and on his own terms. His tangible earnings would become liable to execution for his debts; but he was not under even a moral obligation to restrict his efforts exclusively to the liquidation of them. He might lawfully devote himself to the maintenance of his family only." The case of *Teeter v. Williams*, 3 B. Mon. 562, was an attachment of a sum actually due, and it was held that the court had no power to compel a debtor to perform a contract for labor, so that the creditor may have the benefit of the price, and in any case the

court would not fail to allow the debtor out of the proceeds of his labor sufficient for the support of himself and family. *Tripp v. Childs*, 14 Barb. 85, was decided on the ground of positive fraud and does not support the text: *Gragg v. Martin*, 12 Allen 498, held invalid an assignment of future wages when made for the purpose of preventing such wages from being attached.

In *Patterson v. Campbell*, 9 Ala. 933, the parent invested the fruits of his labor in real estate and took the title in the name of his infant daughter. It was urged that the debtor had the right to appropriate the proceeds of his labor to the advancement of his children in preference to his creditors, but the court held that he could provide a support but not by "investing them with the title to property, which in most if not all cases, must necessarily be a secret trust enuring to the benefit of the parent."

In *Waddingham Ex. v. Loker*, 44 Mo. 132, although it was held that property donated to the wife and daughters of a debtor could not be touched by the husband's creditors, the court stated that the law will not permit a man to withdraw his property from his creditors; nor, if in debt, permit him to devote his capital, industry or credit to the accumulation of property for his own use or the use of his family, to the exclusion of his creditors.

In *Inham v. Schafer*, 60 Barb. 317, the question was whether or not the money and labor furnished by the husband in the erection of a house upon his wife's separate property, was subject to the payment of his debts? The court stated that if the debtor contributed something in the nature of property, it could be reached. "Something which the creditor had the right to claim as property, and which could be appropriated and converted into money by legal process to satisfy a debt or demand. If it was something else, such as the mere labor or skill of the debtor

gratuitously bestowed, no such relief could be had on account of it. The law gives the creditor a lien and claim upon the property of his debtor, upon the fruits of his labor and skill when received or earned, but no lien or claim upon his capacity to labor, or upon his skill and ingenuity. His labor and skill, upon which a creditor has no lien or claim of any kind, the debtor may, if he sees fit, give away to another, and the creditor can have no remedy against the recipient, if it is in fact a mere gift. And so it has been held, that a husband who acts as agent for his wife and over-sees her affairs gratuitously, does not thereby render his wife liable to his creditors for what such services might be worth if compensation were to be made." *Buckley v. Wells*, 33 N. Y. 518.

The object in *Quidort, Admr. v. Pergeaux*, 3 C. E. Green 472, was to subject property in the wife's name, acquired by the joint efforts of husband and wife in a certain business, to the satisfaction of the husband's debts, and the court held the affirmative, stating, "while a husband may, as against his creditors, allow his wife to have for her separate use the earnings of herself and the labor of their minor children, he may not give to her, to be invested in her own name, the proceeds of his own business, skill and labor. Else it would follow that any married man who became embarrassed could transfer his business to his wife, and continue it himself in her name with all his skill and ability; and if she only took or seemed to take some part in the transaction of it, might invest the proceeds of his labor and management in the name of his wife and set his creditors at defiance."

The court, in *Keeney v. Good*, 21 Penn. St. 349, stated that a husband "cannot be prevented from applying the fruits of his personal industry to the maintenance and education of his family;

for the wages of his labor are not liable to attachment. But after supporting his family he must give the best exertions of his mind and body to his creditors. This is but his reasonable duty—a duty sanctioned by all laws, moral, civil and divine." But the facts in this case showed that the property and business were purchased on credit, and much of the purchase-money paid from the profits of the business, although carried on by the husband in the name of the wife. The question was under these facts, who owned the hogs purchased by the husband with money derived from that business? The same court used different language in *Rush v. Vought*, 5 P. F. Smith 437, where the question was, whether or not the products of the wife's farm, produced by the labor of her husband and minor children, were liable for his debts, and held they were not, stating that there is no law which compels a debtor to labor for his creditors, or gives them a remedy against his personal efforts. When his labor is in the form of property, it is liable for his debts. He may gain a debt for his wages but no title to the products, and if he labors for his maintenance alone, his creditors have no remedy against the product. A husband who voluntarily labors on his wife's farm, acquires no title to such product, and hence, his creditors cannot touch it. And see *Manderbach v. Mack*, 5 Casey 43; *Gillespie v. Miller*, 1 Wright 247; *McCullough v. Porter*, 4 W. & S. 177, to the same effect. Yet, in *Bucher v. Ream*, 18 P. F. Smith 421, the stock and produce raised by the husband's labor on the farm rented by the wife, were held liable for the husband's debts; but this ruling was probably based on the ground that the wife did not have a separate estate to make the basis for renting the farm, hence it was the husband's property.

In *National Bank v. Sprague et al.*, 5 C. E. Green 22, the court held that "in all cases where a business is carried on

by husband and wife, in co-operation, and the labor and skill of the husband are contributed and united with those of the wife, the business will be considered as that of the husband, and not of the wife, and the proceeds will not be protected for her as against his creditors." This case involved the primary question of fraudulent conveyance, and the facts that the wife had no prior separate estate, and that she gave a power of attorney to her husband, who was embarrassed, to carry on, in her name, the business he was then conducting, proved the intent to defraud. But see *Pawley v. Vogel*, 42 Mo. 291.

The court, in *Burger v. White*, 2 Bosw. 92, stated that the fruits of the husband's labor, or of the joint labor of husband and wife, were subject to the husband's debts, yet upon the facts in the case, that the wife carried on the business herself, in her own name, with the husband's knowledge, who neither assented or interfered, the court held that such business, and the profits thereof were not liable for the husband's debts.

The facts in *Glidden, Murphree & Co., v. Taylor*, 16 O. St. 509, were: The husband, who had failed in the manufacturing business, started anew, in the same business, with his wife's money, as her agent and trustee. The wife gave no personal attention to the business. The business was successful, through the personal service and skill of the husband, and the profits were, in part, used to support the family, part invested in property, in the wife's name, and the husband used part. There was no contract for compensation for the husband's services, and no accounts were kept between them. The court held the property, except the amount the wife invested, subject to his debts, stating that an arrangement between husband and wife, whereby the husband undertook to carry on the business, in his wife's name, and for her benefit, was a voluntary settlement of the products of his skill and industry in favor

of his wife, and hence, void as to creditors. The principle is the same whether it affects property already acquired, or only future acquisitions. And if the wife suffers her money to be employed by her husband, and blended with his earnings, so that it cannot be separated, though the business be conducted in her name, the most favorable attitude she can be allowed to assume, in a controversy with his creditors, is that of a creditor in equity. The same ruling, substantially, was made in *Shackleford v. Collier*, 6 Bush 149, where it was held that the property in controversy, was, in part, separate estate, and in part, the products of the husband's labor, and that after securing to the wife her interest, the "residue was subject to the claims of the husband's creditors," although if the property accrued in consequence of the money or property of the husband, subject to the claims of antecedent creditors, the wife's claim will generally be made to yield to those of his creditors. This doctrine was enunciated in *Wilson v. Loomis*, 55 Ill. 352; *Brownell v. Dixon*, 37 Id. 198; *Wortman v. Price*, 47 Id. 22; *Elijah v. Taylor*, 37 Id. 249; *Dean v. Bailey*, 50 Id. 481. The court, in *Wilson v. Loomis*, stated that if a married woman place her own funds (and *a priori* her property) in her husband's hands, to carry on a general trade in the wife's name, and the husband, by his labor and skill, increase the funds invested, the entire capital embarked in the enterprise, together with the increase, may be held subject to the claim of husband's creditors. It would be, said the court, as unlawful for the husband to appropriate the result of his labor and skill to the exclusive use of his wife, as her separate property, as it would be to thus appropriate his money, which, in either case, would be a fraud upon his creditors. *Brownell v. Dixon*, held a billiard table, and the profits of the saloon business in the wife's name, but managed by the husband, subject to his creditors. *Wortman v. Price* held

the products of the husband's labor, and the stock purchased by the husband in the wife name, with her funds, liable to his creditors, the court stating that the wife cannot appropriate the fruits of her husband's time, skill and industry, when he is in debt." She can make him her agent, but she cannot do it so as to enable him to engage in trade, manage it, devote all his time and energy to it, and hold the property so embarked, and the profits, beyond the reach of his creditors." The court, in this case, based its ruling not alone on the prior Illinois cases, but upon *Freeman v. Orser*, 5 Duer 476; *Sherman v. Elder*, 24 N. Y. 383; *Wooster v. Northrup*, 5 Wis. 245; *Glover v. Alcott*, 11 Mich. 471; *Gage v. Dauchy*, 28 Barb. 622; *Keeny v. Good*, *supra*, and *Hallowell v. Horter*, 35 Pa. St. 375; which are not entirely in accord with the principle announced.

Although the court, in *Dean v. Bailey*, *supra*, followed the prior rulings, yet the case did not involve the question under discussion. The facts were that the wife owned the farm, stock and implements, and the family resided upon it; and the question was whether or not the husband could exercise such general use and control over the personalty as would be consistent with his marital relations, without subjecting such property to the claims of his creditors. See *Elder v. Cordray*, 54 Ill. 244.

The New Jersey court announced a doctrine similar to that adopted in Illinois, except that the creditors are limited to the products or results of the husband's labor: *Skillman v. Skillman*, 2 Beasley 409; *Johnson v. Vail*, 1 McCarter 423. But as this court cited the New York cases of *Lovett v. Robinson*, 7 How. Pr. 105; *Avery v. Doane*, 3 Am. L. Reg. 229, and *Freeman v. Orser*, 5 Duer 477, it is probable the doctrine goes further.

The case of *Fairbanks v. Mothersell*, 60 Barb. 406, cited in the principal case, contains expressions upon this subject: but that case is only authority upon the

on that a married woman can em-
power her husband as her agent. A ques-
tion settled in the affirmative, as
shown by the cases cited in Kelly on
M. W. 178-185.

In the Michigan case, *Glover v. Alcott*,
Mich. 471, announced that the fruits
of the husband's labor—namely, property
acquired in the business by means of the
husband's labor—was liable to the claims
of creditors. Although Judge CHASE
rendered a lengthy opinion, in
Gamber v. Gamber, 18 Penn. St.
Keeney v. Good, 21 Id. 349; *Swit-
t. Valentine*, 10 How. Pr. 109;
Robinson, 7 Id. 105; *Hurd v.*
9 Barb. 366; *Freeman v. Orser*,
er 479; *Raybold v. Raybold*, 8
s 308; *Marsh v. Hoppock*, 3 Bosw.
Gage v. Dauchy, 28 Barb. 622;
the dissenting opinion of CAMPBELL,
seems the stronger and reasons more
fully.

In the Virginia case, *Penn v. Whitehead*,
att. 74, decided before the passage
of the enabling statutes, held that the
property acquired in the wife's business by
the skill and labor of the husband were
liable to the claims of his creditors;
and this case the principles of the com-
mon law more or less applied to the
question involved.

On the other side of this question the
New York cases afford the best illustra-
tion. In *Knapp v. Smith*, 27 N. Y. 277,
the husband carried on the business as
agent of his wife, and the result of
his labor, amongst other things, was the
acquisition of certain cattle, which the
court held were not liable for his debts;
and, that where an insolvent engages
in business as the agent of the wife,
there is more or less reason to suspect
that it is adopted as a cover to disguise
the ownership of the husband and to
defraud his creditors; but whether it is
so, is a question of fact for the jury
in the forum entrusted with the decid-
ing of such questions."

In *Wells*, 33 N. Y. 518, in-

volved the precise question, and the
court said: "The wife of an insolvent,
having a small separate estate derived
from her mother, is naturally desirous
that her husband may be engaged in
some business by which, in connection
with her estate, a support may be pro-
vided for a large family of children.
The husband had been a merchant. The
wife is willing to embark her property in
that business with which her husband
was familiar, hazardous though it be;
and she empowers him to carry on such
business for her, on her money and
credit, holding himself out to the world
as her agent. There was nothing
fraudulent in that. There is no law
which mortgages to the creditor either
the person or the labors of his debtor.
The duty rests upon him to use his best
efforts for the payment of his debts; but
there is a duty which he owes alike to
the public and to his family which is
sacred, and that duty is to provide for
the nurture, education and support of his
children. In seeking employment for
that purpose, he may apply to the wife,
if she have a separate estate, as well as
to a stranger. The law allows her to
hold property, and, of necessity, must
allow her to manage it herself or employ
others to do it for her. As to that separ-
ate property, she and her husband are
as distinct before the law as if the marital
relation did not exist, and can employ
him and compensate him for the man-
agement of such property." *Draper v.*
Stouvenel, 35 N. Y. 507, accords with
this, and *Sherman v. Elder*, 24 N. Y.
381, contains a dictum against it. In
Gage v. Dauchy, 34 N. Y. 293, the
fruits of the husband's labor were the
crops which he raised on his wife's land,
and the court held they were not liable
to the claims of his creditors. This case
is followed and was controlled by *Knapp*
v. Smith.

The facts in *Abbey v. Deyo*, 44 N. Y.
344, are in point. The husband, being
insolvent, carried on for his wife a large

and profitable business in flour and feed, devoting all his time and industry, but did it under his own name of "*Stephen Abbey, agent.*" The question raised was whether or not the profits and acquisitions accruing by reason of the husband's labor and skill were liable to satisfy the claims of his creditors, and the court held they were not. There was no agreement for the husband's compensation. The court stated that the wife could engage in business and employ her husband to manage it for her; whether it was a device to cover up his property was a question of fact, and if he work for his wife without compensation his creditors cannot complain, have no claim on the products of his industry, and cannot compel him to earn wages for their benefit; and hence he can work for his wife, or another, gratuitously or for maintenance. Said the court: "In arguing this point the appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. This is unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little or nothing, his first duty is the support of his family." *Foster v. Persch*, 68 N. Y. 400, contains expressions to the same effect.

In *Cooper et al. v. Ham et al.*, 49 Ind. 400, the court held that a husband has the right to give his personal services and skill to the management of his wife's property and receive no compensation but the support and maintenance of himself and family. And after a review of a number of cases, the court held the affirmative of, but did not decide the questions discussed in the authorities,

which are whether the husband can, by his labor and skill, add to and increase the separate property of his wife, without giving his creditors the right to have the proceeds and profits apportioned between themselves and the wife; or if the earnings of the husband should be invested in other property, in the name of his wife, or if there should be money coming to him for his services and skill, which could be reached by a proceeding in attachment or supplementary to execution.

Whilst the case of *Patten v. Patten*, 75 Ill. 446, does not decide the point in conflict with the prior Illinois decisions, yet the reasoning in the case approbates the doctrine as advanced by the New York cases.

The case of *Rankin v. West*, 25 Mich. 195, seems to be in conflict with *Glover v. Alcott*, *supra*. In that case the husband was embarrassed. A vendor refused to sell to the husband, but sold to the wife. The business was in the name of the wife, but managed by the husband. The goods in the business were levied upon by the husband's creditors, and the court held that such goods were not liable. COOLEY, J., in delivering the opinion of the court, said: "We have heretofore held that a married woman may carry on business in her own name, and for that purpose may make herself liable for purchases on credit: *Tillman v. Shackelton*, 15 Mich. 447; and as she can do this, there is no reason why her husband may not be her agent for this purpose. If the husband, by reason of his embarrassment, is unable to carry on business and support the family in his own name, it is no impediment to the wife engaging in business for that purpose. It is a very sufficient and laudable motive for her to do so. If the property would never have come to husband or wife, except by the agreement that she should be the purchaser and carry on the business by means of it, such purchase cannot wrong his cred-

Having the right to purchase and sell on the business, it cannot form the basis of complaint that she purposed to keep the property beyond the reach of her husband's creditors."

Keller v. Mayer, Straus & Baum, 104 Ga. 406, the wife borrowed the money, and started the business in her own name, but managed by her husband as agent. The business increased with the borrowed money, and became profitable. The husband gave his entire time and attention to the business. There was no agreement as to his compensation.

The husband's creditor levied on the goods, claiming the products of her labor, but the court held such goods not so liable. The court said: "If the husband, in buying and selling, use the wife's money for her in her business, the goods are the wife's, not the husband's, and are not subject to his debts. She is truly her agent, the fruits of her labor belong to her. If, on the contrary, he is merely using the wife's money with her consent in his own business, she is his creditor for the principal amount loaned, with interest, and the stock and all accumulations are his, and the products of his creditors attach."

Feller v. Alden, 23 Wis. 301, the question was whether or not the products of the husband's labor, to wit, the crops raised on his wife's lands, were subject to his debts; and although the court held they were not, following and citing *New York* cases, including *Owen v. Owen*, 36 N. Y. 601, yet the court said "whether equity will determine the value of the husband's labor and the portion of it to his creditors is not raised in this case. Some such relief was granted in *Glidden v. Taylor*, 16 O. St. 101, which seems reasonable and just." A good exposition of the doctrine was given by the court in *Ashhurst v. Given*, 100 N. H. 323, stating, "A man though not a partner and wholly unable to pay any debts, may dispose of his personal services at what price he pleases, and his

creditors cannot object. If he be content to give them for his mere support and maintenance, he has a right to do so, though, I would say, if he has it in his power by means of his personal services, even when he is destitute of all other means, to support himself and at the same time to pay his creditors, he ought to do so. But if he does not choose to do so, it cannot be tolerated for a moment that his creditors shall be permitted to seize upon whatever has been committed to his possession and care, to be managed expressly for the use and benefit of others and not for himself."

The ruling that the products of the husband's labor in conducting the wife's business or property is not subject to his debts, received the assent of the West Virginia court in a well-considered opinion in *Miller v. Pack et al.*, 18 W. Va. 75.

With respect to the third proposition the rule is settled as stated, but the reasons advanced are different: *Barto's Appeal*, 5 P. F. Smith 386; *Hughes v. Peters*, 1 Cold. 67; *Knott v. Carpenter*, 3 Head 417, 542; *Lutton v. Baldwin*, 8 Id. 209; *Capp v. Stewart*, 38 Ind. 479; *Robinson v. Huffman and Wife*, 15 B. Mon. 80; *Webster v. Hildreth*, 33 Vt. 457; *Pierce v. Estate of Pierce*, 25 Id. 511; *White v. Hildreth and Trustee*, 32 Id. 265; *Cuswell v. Hill*, 47 N. H. 407; *Lynde v. McGregor*, 13 Allen 182; *Corning v. Fowler*, 24 Ia. 584; *Kirby et al. v. Burns et al.*, 45 Mo. 234; *Love v. Graham*, 25 Ala. 187. But in *Kirby et al. v. Burns et al.*, *supra*, it was held that such improvements could be reached by existing creditors of the husband: *Cuswell v. Hill*, 47 N. H. 407; *Pharis v. Leachman*, 20 Ala. 662; *Love v. Graham*, 25 Id. 187. Such as the value of lumber furnished: *Hoot v. Sorrell*, 11 Ala. 386. And the excess: *Lynde v. McGregor*, *supra*. There is no liability even if the improvements were

erected by a mechanic who expended money and labor at the instance of the husband: *Hughes v. Peters*, *supra*; or if made with the full knowledge of the wife: *Capp v. Stewart*, *supra*; or he be insolvent: *Robinson v. Hoffman*, *Webster v. Hildreth*, *supra*. Because the wife could not prevent it, and because if the estate would be liable, it would enable the husband to destroy the separate estate, and because a separate estate cannot be charged by the voluntary act of another: *Corning v. Fowler*, *supra*; *Washburn v. Sprout*, 16 Mass. 449; *Wells v. Ban-*

ister, 4 Id. 515; *Hill on Real Prop.* 54; *Caswell v. Hill*, 47 N. H., 407, and cases cited.

The reasons do not appear sufficient, because no man has a right to cheat his creditors. To divert his means to the improvement of his wife's estate instead of paying his debts is cheating, and a court of equity could, in such cases, protect the wife's property as well as his creditors. However, the courts hold otherwise.

JNO. F. KELLY.

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ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF KANSAS.³

SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁴

SUPREME COURT OF OHIO.⁵

ACCOUNT.

Account rendered—Mistake—Correction.—An account rendered is only *prima facie* evidence against the party making it: *Clark v. Marbourg*, 33 Kans.

Where there has been no mutual examination of an account consisting of many items, and the creditor notifies the debtor of a round sum being due thereon, which, by the mistake of the creditor is much smaller than the actual balance due, and the debtor gives his note for such balance and receives in return a receipt in full: *Held*, that the creditor may bring his action upon the original account, and if the debtor as a defence answers and attempts to prove an account stated and settled, the creditor may show under a reply containing a general denial that there has been no adjustment or settlement of the items of the account between him and the debtor; that the receipt was given by him to the debtor through mistake, and that the debtor is only entitled to credit for the amount of the note given by him: *Id.*

¹ Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1884. The cases will probably appear in 114 U. S. Rep.

² From Hon. N. L. Freeman, Reporter; to appear in 112 Ill. Rep.

³ From A. M. F. Randolph, Esq., Reporter; the cases will probably appear in 33 Kans. Rep.

⁴ From John Lathrop, Esq., Reporter; to appear in 138 Mass. Rep.

⁵ From E. L. DeWitt, Esq., Reporter. The cases will probably appear in 41 or 42 Ohio St. Rep.

ACTION. See *Conflict of Laws*.

AGENT.

Power to Sue.—Where a principal is absent, his general agent, having authority to manage his business, will necessarily have authority in bringing suits to collect debts, and insurance in cases of loss by fire, such being essential to an efficient discharge of his duties: *German Ins. Co. v. Grunert*, 112 Ill.

AMENDMENT. See *Sheriff*.

ASSIGNMENT. See *Conflict of Laws*.

Contract—Evidence.—An agent appointed by the owner to sell coal upon commission, employed another to aid him in effecting a sale, and in giving the latter, as was claimed, one-half of his commissions on a sale at a given price, which sale was effected through the agent, and after the death of the former the latter presented a claim against his estate for one-half of the commissions received. It was held, on review of the evidence, there was no equitable assignment of half the claim for commissions, but that the relation between the two was that of creditor and debtor: *Wymun v. Snyder*, 112 Ill.
The burden of proof is upon a party who claims an equitable assignment of one-half of a demand, to show that fact by satisfactory evidence; this is not shown by proof of casual admissions or statements of the party holding the demand, varying in form of expression and in substance, especially when rebutted by the conduct and acts of the party making the assignment: *Id.*

BILLS AND NOTES. See *Duress*.

Overdue Note—Receipt of Interest in Advance—Note—Surety—Indorsement.—The receipt of interest in advance upon an overdue promissory note from the maker, does not of itself import such a giving of time as to discharge a surety: *Hydenville Sav. Bank v. Parsons*, 138 Mass.
Payments and the indorsements of payments, upon a promissory note which no rate of interest is expressed, of interest at the rate of seven per cent. per annum, in respect of time after the note has become overdue do not amount to a change of the contract, or satisfy the statutory requirement of an agreement in writing to bind the maker to pay that in the future: *Id.*

COMMON CARRIER. See *Master and Servant*.

Dead Passenger—Duty of Railroad—Negligence—Damages.—In an action brought against a railroad company in behalf of the next of kin, or the personal representatives of a deceased person, to recover damages for injuries resulting in the death of such person, nominal damages may be recovered, if it appears that his death was caused by the wrongful omission of the defendant, although no actual pecuniary damages have been shown or suffered: *Atchison, T. & S. Railroad v. Weber*, 138 Kans.

It is the duty of a railroad company carrying passengers to provide for their quiet and comfort, and secure them against the annoying and abusive conduct of other passengers; and where the conduct of a pas-

senger is such as to render his presence dangerous to fellow passengers, or such as will occasion them serious annoyance and discomfort, it is not only the right, but the duty of a railroad company to exclude such passenger from its train : *Id.*

Where an unattended passenger after entering upon a journey becomes sick and unconscious, or insane, it is the duty of the railroad company to remove him from the train and leave him until he is in a fit condition to resume his journey, or until he shall obtain the necessary assistance to take care of him to the end of his journey : *Id.*

The duty of a railroad company to such a passenger does not end with his removal from the train, but it is bound to the exercise of reasonable and ordinary care in temporarily providing for his protection and comfort; and *held*, that the railroad company may have exercised due care towards such a passenger who is without friends or money when it carefully and prudently removes him from its train, and promptly places him in charge of the overseer of the poor. The statute makes it the duty of the overseer of the poor in any township or city to grant temporary relief to any non-resident who may be found lying sick therein, or in distress and without friends or money, and the expense of providing such relief is to be paid out of the county treasury : *Id.*

CONFLICT OF LAWS.

Action for Diverting Stream to Injury of Property in another State.—An action of tort, for diverting the waters of a natural stream in this Commonwealth, and preventing the same from coming to the plaintiff's mill in an adjoining state, may be maintained in this Commonwealth : *Mannville Co. v. Worcester*, 138 Mass.

In an action for diverting the waters of a natural stream, and preventing the same from coming to the plaintiff's mill, the fact that a certain percentage of the water was returned to the stream may be considered in estimating the amount of damages : *Id.*

Assignment of Insurance Policy—Foreign Company.—If an assignment is made in this Commonwealth, between parties domiciled here, of a policy of insurance issued by a company organized under the laws of another state, but delivered here, the questions of the validity of the assignment and of the capacity of the parties to contract are to be determined by the law of this Commonwealth : *Mutual Life Ins. Co. v. Allen*, 138 Mass.

CONSTITUTIONAL LAW. See Criminal Law.

Right of Holder of Coupons of Virginia State Bonds to Pay Taxes therewith—Law impairing the Obligation of a Contract—What is not a Suit against a State within the Eleventh Amendment to the Constitution of the United States.—In an action of detinue for personal property, distrained by the defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the state of Virginia under the funding act of March 30th 1871, *held*, that by the terms of that act, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon holder and the state that such coupons should "be receivable at and after maturity for all taxes, debts, dues and demands due the state;" the right

the coupon-holder, under which, was to have his coupons received for when offered, and that any act of the state which forbids the redemption of these coupons for taxes is a violation of the contract, and void against coupon-holders: *Poindexter v. Greenhow*, S. C. U. S., Oct. 1884.

An action or suit brought by a tax-payer, who has duly tendered such coupons in payment of his taxes, against the person who, under color of office as tax collector, and acting in the enforcement of a void law, authorized by the legislature of the state, having refused such tender of coupons, proceeds by seizure and sale of the property of the plaintiff, to enforce the collection of such taxes, is an action or suit against him personally as a wrongdoer, and not against the state, within the meaning of the eleventh amendment to the constitution of the United States: *Id.*

CONTRACT. See *Conflict of Laws*

CORPORATION. See *Municipal Corporation*.

Description to Stock—Liability of Subscriber for Debts.—There is no liability on a subscription to the stock of a corporation, the amount of whose capital stock is fixed, until the whole amount of the stock is subscribed: *Temple v. Lemon*, 112 Ill.

A subscriber to the capital stock of a proposed corporation, when the amount of stock fixed by law or by the action of those connected with it is not subscribed, cannot be held liable individually for a debt of such corporation, unless for some cause he has estopped himself from denying that the whole of the fixed capital stock was never subscribed:

COSTS. See *Errors and Appeals*.

CRIMINAL LAW.

Presentment or Indictment by a Grand Jury—Infamous Crime—Constitutional Law.—A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the fifth amendment of the constitution of the United States, is entitled to be discharged on *habeas corpus* from the Supreme Court of the United States: *Ex parte Wilson*, S. C. U. S., Oct. Term 1884.

A crime punishable by imprisonment for a term of years at hard labor is not an infamous crime, within the provision of the fifth amendment of the constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury: *Id.*

DAMAGES. See *Conflict of Laws*; *Malicious Prosecution*.

DIVORCE.

Insane Wife—Suit by Guardian.—The guardian of an insane woman cannot bring and maintain an action against her husband for divorce and alimony, or for alimony alone: *Birdsell v. Birdsell*, 33 Kans.

DOMICILE.

Infant Orphan residing with a Grandparent.—The grandfather or grandmother of an infant, when the next of kin, is the guardian by law. XXXIII.—61

nature of such infant ; and infants having a domicile in one state, who after the death of both their parents take up their residence at the home of their paternal grandmother and next of kin in another state, acquire her domicile : *Lamar v. Micou*, S. C. U. S., Oct. Term 1884.

DURESS.

Note given by Person under Arrest.—No action can be maintained upon a promissory note, given by a person while under arrest on a complaint for larceny of property exceeding in value \$100, to the owner of the property alleged to have been stolen, under an agreement that the complaint shall be placed on file, the plaintiff having received the note with notice of the circumstances ; and the question of the guilt or innocence of the accused person is not open in such action : *Gorham v. Keyes*, 138 Mass.

EQUITY. See Assignment.

Practice—Allowing New Answer.—A motion by a defendant in a bill, to set aside an interlocutory decree and for leave to file a new answer, is addressed to the sound discretion of the court, with which this court will not interfere, unless it can see that such discretion has been abused : *Schmidt v. Braley*, 162 Ill.

The proper practice in a case where a defendant desires to file a new answer to the bill, is to prepare the answer and submit it to the court with the motion for leave to file it. If the proposed new answer is frivolous, impertinent or scandalous, the court should not allow it to be filed : *Id.*

Reformation—Specific Performance—Evidence.—In an action to reform a contract and for relief thereunder, after the same is reformed, the court may specifically enforce the same when that may be done, or may give adequate compensation for its non-performance : *Columbus & Toledo Railroad v. Steinfeld*, 41 or 42 Ohio St.

On trial of an action to reform a written substituted contract for fraud or mistake, and to enforce the same when reformed, or if the same could not be reformed, then to rescind the written contract, there may be given in evidence the original writing made by the same parties upon the subject-matter in dispute, and also the subsequent acts done or procured to be done by the party charged with the fraud and which tend to prove the fraud or mistake : *Id.*

On such a trial, the court may find that the written contract in dispute does not contain the true agreement of the parties, but if the party complaining neither pays back nor offers to return the money received by him under the contract, it is error to order the contract to be set aside and held for naught : *Id.*

ERRORS AND APPEALS.

Motion to Dismiss Writ of Error for want of Jurisdiction.—Costs on. —The Supreme Court of the United States upon dismissing a writ of error for want of jurisdiction can adjudge to the defendant in error the costs incident to his motion to dismiss, though not the costs of the suit : *Bradstreet Co. v. Higgins*, S. C. U. S., Oct. Term 1884.

EVIDENCE. See *Account*; *Assignment*; *Negligence*.

Show Pain—Physician.—On the trial in an action for a personal injury, the plaintiff called his attending physician, who testified that he examined the plaintiff, who stated the symptoms, and that he had pain. The witness was then asked whether the plaintiff was lying or "making believe," to which he answered, "No, sir; I know him, not, from examination and tests." *Held*, that, with the explanation to his means of knowledge, there was no error in the admission of the evidence. The answer could only be understood as a deduction from the examination and tests made: *Chicago, B. & Q. Road Co. v. Martin*, 112 Ill.

In such a case, the attending physician, having every means of observing the symptoms, may be asked if the patient suffered pain, and his answer in the affirmative can be considered only as an opinion based on actual facts and tests. It does not even require an expert to know the existence of pain from the nature of the injury and the patient's outward manifestations: *Id.*

FIXTURE.

Fence built on Land of another—Notice—Purchaser.—A fence built by a person upon the land of another under a parol license or agreement that it might be removed at the will of the builder, becomes a fixture which will pass with a grant of the land to a *bona fide* purchaser without notice of the adverse title to such fence: *Rowand v. Anderson*, 33 Kans.

The legal effect of attaching an improvement of a permanent character to land may be controlled by the agreement of the parties as between themselves and those who have knowledge of such agreement, but a parol agreement cannot be sustained or held to be binding upon a subsequent vendee who had no notice of the parol agreement under which the improvement was annexed to the land: *Id.*

Under the facts stated in this case, *held*, that the location of the fence and the use were not sufficient to reasonably excite inquiry regarding the ownership of the fence, nor were they sufficient to charge the plaintiff with notice of the adverse interest therein: *Id.*

HIGHWAY.

Municipal Corporation—Defective Sidewalk—Negligence.—The fact that a person uses a street or sidewalk after he has notice that it is out of repair is not necessarily negligence. Persons are not to be entirely exempted from the use of a street because it may be defective or somewhat dangerous, but where danger exists, and it is known, ordinary prudence requires of those using such street, greater vigilance and care and diligence, corresponding with the danger, to avoid injury: *City of Emporia v. Schmidling*, 33 Kans.

In an action brought against a city to recover for personal injuries alleged to have resulted from a defective sidewalk, the fact that the sidewalk was removed by the city authorities and another and a better sidewalk substituted therefor soon after the injury occurred, may be considered as a circumstance tending to show that the sidewalk removed was out of repair, but it is no evidence that the city authorities had knowledge of the defect before the occurrence of the injury: *Id.*

Defective Sidewalk—Negligence—Use of Velocipede—It cannot be ruled, as matter of law, that the use of a velocipede upon a sidewalk of a street is necessarily unlawful: *Purple v. Greenfield*, 138 Mass.

An opening about a foot and a half deep, a little more than a foot in width, and two feet and a half long, was made six inches from the line of the sidewalk in a town, for the purpose of furnishing light and air to the cellar of a building. There was nothing to indicate where the line of the sidewalk ended. The opening had existed for some months, and was covered by a loose board, and was known to be so covered by the chairman of the selectmen of the town. While the board was off, a person travelling on the highway stepped into the opening. *Held*, in an action against the town for an injury thereby occasioned, that the jury were authorized to find that the town had reasonable notice of a hole, insecurely guarded, near the limit of the highway: *Id.*

Municipal Corporation—Negligence.—A town is not bound to erect barriers to prevent a person travelling with a horse and wagon from straying from a highway, although there is a dangerous place thirty-four feet from the marked travelled part of the highway, and nine and a half feet from the line of the location of the highway, which he may reach by so straying: *Barnes v. Chocopee*, 138 Mass.

HUSBAND AND WIFE. See *Divorce*.

Contract to Charge separate Estate—Action on.—A contract by which a married woman charges her separate estate, in equity, with the payment of a debt, need not be in writing: *Elliott v. Lawhead*, 41 or 42 Ohio St.

An action founded on such a contract, where a personal judgment against a married woman is not authorized, is of an equitable nature, of which a court of equity alone has jurisdiction: *Id.*

The rule that a creditor must exhaust his remedy at law before seeking equitable relief, does not apply to an action to charge the separate estate of a married woman for the payment of a claim, where the statute gives no remedy at law: *Id.*

A prior action to recover a money judgment, in which it is sought to reach the same separate property by attachment, in which the plaintiff fails, is no bar to a suit in equity to charge such separate property, with the judgment of the same claim: *Id.*

INFANT. See *Domicile*.

INJUNCTION.

A Proper Remedy to Prevent Collection of Taxes by Distraint after Tender in Tax-receivable Coupons.—The remedy by injunction to prevent the collection of taxes by distraint upon the rolling stock, machinery, cars, and engines, and other property of railroad corporations, after a tender of payment in tax-receivable coupons, is sanctioned by repeated decisions of this court, and has become common and unquestioned practice, in similar cases, where exemptions have been claimed in virtue of the constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law: *Allen v. B. & O. Railroad Co.*, S. C. U. S., Oct. Term 1884.

INSURANCE. See *Conflict of Laws*.

Assignment to Person having no Insurable Interest.—If a policy of insurance on the life of another is issued to a person having an insurable interest in such life, an assignment of such policy to a person having no insurable interest does not render the assignment void: *Mut. Life Co. v. Allen*, 138 Mass.

Proof of Loss—Time—Waiver—Absence of Insured.—Where a policy of insurance requires the assured, within thirty days after any loss, to furnish proofs of the same, signed and sworn to by him, the proof of loss should be so signed and sworn to, unless there is some legal excuse. His absence at the time of the loss, and failure to return in time, is a sufficient legal excuse, and in such case the proofs may be signed and verified by his agent having charge of his business: *German Ins. Co. v. Grunert*, 112 Ill.

Where written notice and proof of loss are made out and delivered to the insurance company within the required time, by the agent of the insured, the latter being absent from home, and the company returns the notice and proofs, with objections thereto, and they are amended by the insured and again delivered, and they are again sent back for amendment, when this is made, and this is repeated several other times, this will be held sufficient by the company of the objection that such notice and proofs were not delivered in proper time: *Id.*

Condition against Vacation of Building.—An absolute condition in a fire insurance policy, on a dwelling-house, that the policy shall be void if the building insured be vacated or left unoccupied," avoids the policy, although the vacation of the house results from the permanent removal of the tenant of the insured during the running of his lease, without the knowledge or consent of the landlord: *Farmers' Ins. Co. v. Wells*, 41 or 42 Ohio St.

INTEREST. See *Bills and Notes*.

JUDGMENT.

Confession—Power of Clerk in Vacation—Meaning of Vacation—Practical Act.—Where a circuit court adjourned over for thirty-two days, it is held that the period intervening in which the court did not sit to transact business was to be regarded as vacation, within the meaning of that word in section 66 of the Practice Act, authorizing judgments by confession in vacation. But the word is not to be understood as embracing all the time the court is not actually in session, or as embracing the time of an adjournment from day to day: *Conkling v. Conkling*, 112 Ill.

LIMITATIONS, STATUTE OF.

Public Nuisance—Right of Action for—Lapse of Time.—Maintaining an action for twenty years does not give a prescriptive right to maintain it: *Inhab. of New Salem v. Eagle Mill*, 138 Mass.

An action, by a person who suffers a peculiar and special damage from a public nuisance, may be maintained against a person who continues the nuisance, although a recovery for the injury done by the creation of the nuisance is barred by the Statute of Limitations: *Id.*

LUNATIC. See *Divorce*.

MALICIOUS PROSECUTION.

Corporation—Attachment—Damages.—An action may be maintained against a corporation to recover damages for wrongfully, maliciously and without just or probable cause, obtaining and levying an order of attachment upon personal property: *Western News Co. v. Wilmarth*, 33 Kans.

Where it is alleged in a petition brought to recover damages therefor, that an order of attachment was wrongfully, maliciously, and without just or probable cause sued out; that a stock of goods was levied thereon and withheld from the owner for about two months, and thereby his business completely broken up, it is not error on the part of the court, trying the case without a jury, to receive evidence showing the value of the stock on hand at the time of the attachment; that the owner was doing a business from \$6000 to \$7000 per annum, with a net profit of \$1500 to \$1600 per year, and that on account of the attachment proceedings his business was broken up, as in such a case vindictive or exemplary damages are allowable: *Id.*

MASTER AND SERVANT.

Common Carrier—Assistance rendered by Passenger at request of Driver—Injury through Fault of Driver.—The plaintiff was a passenger on defendant's street railroad, on a car northward bound. The railway was a single track, with occasional side-tracks for the passage of cars moving in opposite directions. The northbound car, having been drawn beyond the side-track, where it was to have met the southbound car, it became necessary to push it back to the side-track, so that the cars could pass and each proceed to its destination. At the request of the driver of the northbound car, the plaintiff assisted him in pushing the car back to the side-track. While so engaged, without fault on his part, he was injured by the carelessness of defendant's driver on the southbound car: *Held*, 1. The plaintiff did not engage in the service of defendant as a mere volunteer. 2. Under the circumstances the plaintiff cannot be considered as a fellow-servant with the driver of the southbound car. 3. In the case stated, the doctrine of *respondet superior* applies: *McIntire Street Rd. v. Bolton*, 41 or 42 Ohio St.

MORTGAGE.

Assumption of Mortgage Debt—Liability of Purchaser.—A purchaser of mortgaged premises from the mortgagor, who assumes payment of the mortgage debt, or who accepts a conveyance reciting his assumption of the same with a knowledge of such recital, will at once become personally liable to the mortgagee for the mortgage indebtedness, and he cannot defeat the mortgagee's right to hold him responsible, by procuring a release from the mortgagor: *Bay v. Williams*, 112 Ill.

The acceptance by the purchaser, of a conveyance by a mortgagor of his equity of redemption in mortgaged premises, is a sufficient consideration for a promise by the grantee to assume and pay the mortgage debt: *Id.*

A promise by one, upon a valuable consideration moving from another, to pay the debt of that other to a third person, inures to the benefit of such third person; and his right to maintain an action upon it is vested

by force of the agreement itself. The express assent of the beneficiary is not essential to his right to avail of its benefits : *Id.*

Subrogation—Money obtained on Forged Mortgage to pay off Valid Mortgage—Rights of Mortgagee.—Where money is loaned upon the security of what is supposed to be a valid mortgage, but which in fact is forged and void mortgage, and the money is so loaned for the purpose of paying a prior valid mortgage may be discharged, which is done, the mortgagee of the void mortgage may be subrogated to the rights of the prior mortgagee, there being intervening liens or incumbrances, *Everston v. Farmers' Loan and Trust Bank*, 33 Kans.

And in such a case, where the mortgagee of the void mortgage assigns the same in the regular course of business to an innocent purchaser, such innocent purchaser takes the place of the mortgagee of the void mortgage with all his rights of subrogation : *Id.*

MUNICIPAL CORPORATION. See *Highway*.

NEGLIGENCE. See *Common Carrier* ; *Highway* ; *Master and Servant*.

Crossing Railroad—Duty to Look or Listen.—It is the duty of a person about to cross a railway track to make a vigilant use of his eyes and ears, as far as there is an opportunity, in order to ascertain if there is any present danger in crossing. A failure to listen or look, when by the exercise of this precaution the injury might have been avoided, is negligence which will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury : *Union Pacific Railroad v. Adams*, 33 Kans.

NEGOTIABLE INSTRUMENT.

Money obtained in obtaining—Bona fide Holder—United States.—Where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from that office money belonging to the United States, and, to replace it, pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States is not liable to refund the money to the bank. The case distinguished *United States v. State Bank*, 96 U. S. 30 : *State Bank v. United States*, S. C. U. S., Oct. Term 1884.

NOTICE. See *Fixture*.

Possession under Contract of Sale—Payment to Vendor in ignorance of subsequent Mortgage.—A. loaned to B. a sum of money, receiving B.'s promissory note and a mortgage on real estate to secure the same ; but when A. accepted the note and mortgage, C. was in actual possession of the premises, and resided thereon with his family : *Held*, that A. was not liable with notice of C.'s rights and interest in the premises ; and that having assigned the note and mortgage his assignee occupied the same situation ; nor will the fact that A. and his assignee did not know that C. was in possession, make any difference : *Ranney v. Hardy*, 41 Ohio St.

When A. sold to C. real estate, placed him in possession, and agreed in writing to execute to him a deed on payment of the purchase-money in

monthly instalments. Subsequently B. executed to A. a mortgage on the premises, which was recorded: *Held*, that such mortgage was valid, but subordinate to the rights of C.; that C. may validly make payments of purchase-money to B. until A. or his assignee, by suit, or in some other unequivocal form, asserts the right to receive from C. the unpaid instalments of purchase-money; and that the assignee of C. has the same right: *Id.*

NUISANCE. See *Limitations, Statute of.*

PARTNERSHIP.

Insolvency—Liability of a Retiring Member.—Where a member of a partnership retires from it, and his copartners, who continue the business, thereupon agree, in good faith, to pay him a sum certain as his share of the capital, and the firm afterwards unexpectedly turns out to have been insolvent at the time of the said withdrawal: *Held*, that a bank from which the new firm had borrowed money which they had partly used in making payments to the said retiring member, could not in equity charge the old firm with the money loaned to the new, nor the retiring partner with the moneys obtained from it and used to pay him, the retiring partner having paid in discharge of the debts of the old firm, more than the amount received by him as his share of the capital thereof: *Penn Bank v. Furness*, S. C. U. S., Oct. Term 1884.

RAILROAD. See *Common Carrier.*

SALE.

Ambiguous Terms—Liability of Vendee.—Where a proposition to sell goods is sent by a writing, that, by mistake, is ambiguous; and, knowing of such ambiguity, the receiver of the writing claiming an improbable meaning, unreasonably favorable to himself, and not intended or thought of by the sender, and without notice to the sender or inquiry of him as to his intended meaning, orders the goods, obtains, and uses them, such receiver of the goods is liable to the seller of the same for the value of the goods used, as if no proposition had been sent: *Butler v. Moses*, 41 or 42 Ohio St.

USURY.

Separate Loans—Deduction of whole Usury from last Loan.—In 1869, 1870 and 1872, A. loaned money to B., taking at each loan a promissory note therefor, the note for the loan of 1870 embracing also the amount of the loan of 1869, and the note for the loan of 1872, embracing also the amount of the two preceding loans. In each of the notes usurious interest was incorporated. *Held*, that in an action to foreclose a mortgage given to secure the payment of the note of 1872, and obtain a sale of the mortgaged premises, all the illegal interest should be deducted: *Beals v. Lewis*, Ohio St.

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VALIDITY OF BONA FIDE VOLUNTARY CONVEYANCES BY SOLVENT DEBTORS, AS AGAINST PRIOR CREDITORS.

THE question of whether or not gifts and voluntary conveyances, without any dishonest intent, by solvent debtors, can be upheld against the claims of pre-existing creditors, is a vexed one. Its answer depends upon what interpretation should be given to the statute of 13 Eliz. c. 5, and the various state statutes, which have been modelled upon it, and which are for the most part, simply enactments of it. The text of the English act will be found in the note below.¹

'13 Eliz. c. 5. For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and in tenements, as of goods and chattels, commonly used and practised in these days than hath been seen or heard of before; which feoffments, gifts, grants, &c., * * * have been and are devised and devised of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, debts, &c., * * * not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, maintaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

Be it therefore declared, ordained and enacted, that all and every feoffment, gift, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made to or for any intent or purpose

It is said to have been declaratory of the common law (*Twyne's Case*, 1 Smith's L. C. 1; *Hamilton v. Russell*, 1 Cr. 309; *Cadogan v. Kennett*, 2 Cowp. 432; Fonblanque's Eq. *278), which upon the subject under discussion, seems to have resembled the civil law. Under that law all dispositions of property, on the score of liberality by debtors, were invalid as against pre-existing creditors, in case the latter were thereby prejudiced: 1 Domat's Civ. Law, §§ 1634, 1639.

ENGLISH DOCTRINE.—The English authorities upon this subject are not harmonious. *Twyne's Case*, 1 Smith's L. Cas. 1, is the leading one upon the statute. In that case the conveyance was by an insolvent debtor, who retained possession, to a creditor who was not related to him, and hence it does not bear directly upon the subject of this article; but it contains an expression of opinion by Lord COKE, the reporter, which should carry weight because uttered so soon after the passage of the 13th Eliz. by a judge of such great learning. It is as follows: "And when a man being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.*, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want, who had made such gift to him, *vide* 33 H. 6, 33, by Prisot, if the father enfeoffs his son and heir apparent within age, *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust, either expressed or implied: by which it appears that, as a gift made on a

before declared and expressed, shall be from henceforth deemed and taken, only as against that person or persons, his or their heirs, successors, executors, administrators and assigns and every of them, whose actions, suits, debts, &c., * * * by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect, any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

"Provided, that this act or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be, upon good consideration and *bona fide*, lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration, is not within the proviso, but it ought to be on a good consideration and also *bona fide*." Chancellor HARDWICKE appears to have agreed with Lord COKE. In *Townshend v. Windham*, 2 Ves. 401, where the conveyance was to the grantor's child, and left the grantor solvent, and the attacking party was a prior creditor, the learned chancellor said: "I know no case on the 13th Eliz. where a debtor indebted at the time makes a mere voluntary conveyance to himself without consideration, and dies indebted, but that it shall be treated as part of his estate for the benefit of his creditors. * * * a man actually indebted and conveying voluntarily, always means to defraud of creditors, I take it."

In *Spirett v. Willows*, 3 DeG., J. & S 293 (1864), the question was as to the validity of a post-nuptial settlement which had left the grantor perfectly solvent but considerably indebted. The settlement was attacked by a prior creditor as fraudulent. There was no direct evidence of a fraudulent intent, but it was shown that the grantor after making the settlement the grantor had converted his property into money and spent it in the payment of debts, costs and other expenses, and sometime afterwards became insolvent. In delivering the opinion of the Court of Appeals, Lord CHANCELLOR WESTBURY said: "There is some inconsistency in the authorities on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded: If the debt is due to a creditor by whom the voluntary settlement is impeached at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement of property or gift be impeached by subsequent creditors whose debts were not contracted at the date of the settlement, then it is necessary to show either that the settler made the settlement with fraudulent intent 'to delay, hinder or defraud creditors, or that, at the time of the settlement, the settler had not sufficient means or reasonable expectation of being able to pay his then existing debts, or that, as to say, was reduced to a state of insolvency: in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void. It is obvious that the fact of a voluntary settler retaining money

enough to pay the debts which he owes at the time of settlement, but not actually paying them, cannot give the character to the settlement or take it out of the statute. It remains a voluntary alienation, or deed of gift whereof the remedies of creditors are delayed, hindered or defeated.

The only English case directly involving the rights of a creditor which is squarely opposed to the rule in *Spence* is, I believe, *Henderson v. Lloyd*, 3 F. & F. 7 (1841), in which a post-nuptial settlement which had left the settlor with nothing that could be seized under an execution except a sum of money in his wife's hands, which was insufficient to pay the debt, was attacked by a prior creditor. ERLE, C. J., in delivering the judgment, told them that the validity of the settlement depended upon the settlor's, "object and intent" without regard to the result, and that the question of intent was for them to decide.

This case goes so far as to overthrow itself. It cannot be said to have been passed upon by a court of last resort.

In *Freeman v. Pope*, L. R., 5 Ch. App. Cas. 538 (1880), the conclusions reached by Chancellor WESTBURY in *Spence* and characterized as *dicta*, unnecessary to the decision, were before him, because as it was thought, it was a case in which the facts proved showed fraud in fact. It is noteworthy that the vice-chancellor in deciding *Freeman v. Pope*, L. R., 5 Ch. App. Cas. 206, expressed the opinion, that no fraudulent intention was shown in *Spirett v. Willows*.

At any rate, the criticism of Chancellor WESTBURY's conclusions seems to have been entirely unnecessary, for the result in *Freeman v. Pope* had left the grantor insolvent and the settlement held fraudulent for that reason. The complainant was not a creditor, but he was thought to have the same right as a creditor, because there was a prior creditor who might have been paid by the bill. The court seems to have been of the opinion that the grantor's indebtedness is not sufficient to render a voluntary settlement void as to pre-existing creditors; but laid down that if, after deducting the property conveyed, sufficient assets were not left for the payment of the grantor's debts an insolvency is conclusively presumed at law as well as in equity. This result thus laid down is supported by considerable *dicta* in *Kennett*, 2 Cowp. 432; *Lush v. Wilkinson*, 5 Ves. 221; *Kyn v. Vaughan*, 3 Drew. 419; *French v. French*, 10 Ves. 399.

95; *Shears v. Rogers*, 3 B. & Ad. 362; *Corlett v. Radcliffe*, 14 Q. B. 121; *Holmes v. Penny*, 3 Jur. N. S. 80.

The conveyance in *Freeman v. Pope*, was to a stranger, and the case goes farther than the American decisions in placing it upon an equality with conveyances, in consideration of natural love and affection. The case has been cited as settling the English rule, but *Freeman v. Willows*, appears to the writer to be entitled to quite as much weight.

AMERICAN DOCTRINE.—*Reade v. Livingston*, 3 Johns. Ch. 481 (1808), is a leading case upon this subject. The conveyance there involved was a post-nuptial settlement, which though *bona fide*, left the grantor insolvent. It was decided by Chancellor KENT, who, after a careful examination of the English cases, arrived at a conclusion similar to the one since reached by Chancellor WESTBURY. "The conclusion to be drawn from the cases," said the learned Chancellor, "is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect of the debts, and no circumstances will permit those debts to be repelled by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of the creditors to prove the settlement to defraud. The law has, therefore, wisely disabled the grantor from making any voluntary settlement of his estate to stand in the way of existing debts. This is the clear and uniform doctrine of the cases."

The rule thus broadly laid down has been condemned, however, in New York: *Jackson v. Seward*, 5 Cowen 67; s. c. 8 Id. 406; *Van Hook v. Seward*, 1 Ed. Ch. 327; s. c. 6 Paige 64; 18 Wend. 15; and in order to prevent further discussion, a statute has been enacted, providing that the question of fraud shall be deemed one of fact, and that no conveyance shall be considered fraudulent as against creditors or purchasers solely on the ground that it was not founded upon a valuable consideration: 3 R. S. N. Y., p. 2329.

The two cases above referred to involved the same facts. The question in question was a guaranty of a judgment. The judgment was a lien upon real property, amply sufficient to satisfy it, if sold

at its real value. The property was sold to satisfy a debt, and was bought in for a trifle by the owner of the judgment. The voluntary conveyance in question was to the grantor's child, made in good faith, and left the grantor in possession of the property to pay his debts, and was held valid as against his creditors. In *Van Wyck v. Seward*, the vote in the Supreme Court was 15 to 14. *Jackson v. Seward*, can hardly be taken as the authority of itself for anything, because of the difference of the judges for voting for a reversal, and it is thought that *Wyck v. Seward* is not authority for any broader principle than that laid down in *Salmon v. Bennett*, a case which will be referred to hereafter.

EXTENT TO WHICH THE DOCTRINE OF READE V. LIVINGSTON HAS BEEN ADOPTED.—So far as voluntary conveyances to children are concerned, the doctrine of *Reade v. Livingston* is binding on the law throughout the United States, in the absence of authority changing the rule, at least in those cases where pre-existence of a debt would be uncollectible without resort to the proper legal process. *McLean v. Weeks*, 65 Me. 411; *Clark v. Depew*, 25 N. Y. 100.

It is true that courts have in a number of cases held that the rule that a voluntary conveyance by a debtor which leaves him in possession of property out of which all his pre-existing debts at the time have been collected by process of law, are void, is subject to reference to the facts involved, it will be found in every case of this kind, that the conveyance in question was to a relative, and the language of the court should of course be taken in connection with the facts to which it was intended to apply.

In Alabama and New Jersey the doctrine of *Reade v. Livingston* is accepted in its entirety. No distinction is made between conveyances to children and those to strangers, or between those which leave the grantor solvent and those which make him insolvent. *Thompson*, 3 Porter 196; *Doe v. McKinney*, 5 Ala. 100; *v. Spence*, 6 Id. 506; *Foote v. Cobb*, 18 Id. 585; *Eslava*, 20 Id. 732; *Spencer v. Godwin*, 30 Id. 355; *v. Mucolls*, 37 Id. 662; *Crawford v. Kirksey*, 38 Id. 100; *McAnnally v. O'Neal*, 56 Id. 299; *Early v. Owens*, 57 Id. 100; *Den v. De Hart*, 6 N. J. L. 450; *Den v. Lippincott*, 1 N. J. L. 100; *v. Johnson*, 12 N. J. Eq. 51; *Smith v. Vreeland*, 13 N. J. Eq. 100; *Gardner v. Short*, 19 Id. 341; *Kuhl v. Martin*, 26 Id. 100; *v. Morrison*, 25 Id. 538; *Haston v. Castner*, 31 Id. 63.

Clark v. Hamilton, 34 N. J. 158; *Aber v. Brant*, 36 Id. 116; *Perthwaite v. Emley*, 4 N. J. Eq. 489.

and the rule seems to be the same in Michigan: *Fellows v. Smith*, Mich. 689; *Matson v. Melchor*, 42 Id. 477. In both of the cases the conveyance was to the grantor's wife, and it does not appear in either, whether sufficient property was retained to satisfy pre-existing debts or not. In *Fellows v. Smith*, CAMPBELL, (with whom the other judges concurred), said: Where a conveyance from a husband to a wife is a voluntary one, without valuable consideration, it is void in law as against creditors, because if they had property they could have reached had no such transfer been made. An actually fraudulent design is not necessary to defeat a voluntary conveyance as against existing creditors.

Cutter v. Griswold, Walker's Ch. 437 (1844), which involved the validity of a voluntary conveyance to a son as against a pre-existing creditor, Chancellor MANNING laid down the rule adopted in *Almon v. Bennett*, 1 Conn. 525, but it did not appear that the grantor had reserved anything, and the learned chancellor considered the conveyance fraudulent in fact.

In South Carolina the test is whether or not the creditor has been in good faith prevented from collecting his debt by the conveyance. If there is, has, the retention by the debtor, of property sufficient at the time of the conveyance to pay all pre-existing debts, will not prevent the creditor from having recourse to the property conveyed: *Blair v. Izard*, 1 Bailey Eq. 228; *O'Daniel v. Crawford*, 4 S. C. 197; *Blakeney v. Kirkley*, 2 Nott & McC. 544; *Simpson v. Esch*, Riley's Ch. Cas. 232.

Two exceptions to the general rule are recognised, however. First, where a voluntary conveyance of an inconsiderable portion of the grantor's estate is made to a wife or child, and sufficient property is retained to satisfy all pre-existing debts is retained, and the grantor subsequently becomes insolvent in consequence of sudden unforeseen and extraordinary events beyond his control (*Buchanan v. McNinch*, 3 S. C. 498), or the creditor's failure to collect his debt is the result of his own laches (*Richardson v. Rhodus*, 14 Rich. Law 95: *Clark v. Bowman*, Rich. Eq. Cas. 185; *Buchanan v. McNinch*, 3 S. C. 498), the conveyance will be upheld.

The same rule seems to have been adopted in Iowa, though the decisions in that state are not entirely harmonious. *Stephenson v. Cook*, 10 W. Rep. 182; *Moore v. Orman*, 56 Ia. 39; *Boulton v.*

Hahn, 58 Id. 518. *Carson v. Foley*, 1 Id. 524, and *Figgins*, 37 Id. 519, contain dicta in favor of the rule in *v. Bennett*.

CONVEYANCES TO RELATIVES.—*Salmon v. Bennett* (1816), has exercised a much more powerful influence on the course of American decisions than *Reade v. Livingston*. It is an exception to the general rule against voluntary conveyances to creditors, in favor of those made to relatives in consequence of natural love and affection, which is now recognised in all the states.

The case was an action of ejectment for land which had been voluntarily conveyed by one Sherwood to his son, and which the defendant claimed. The plaintiff claimed by virtue of a judgment in an execution in his favor, against the grantor. The conveyance was made without fraudulent intent, and left the grantor in possession of ample means to pay all pre-existing debts.

SWIFT, C. J., in delivering the opinion of the court, says: "Voluntary and fraudulent conveyances are void as to creditors. In the case of a voluntary conveyance, a distinction is made between the children of the grantor and strangers. Mere indebtedness at the time will not in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child in consequence of love and affection; for if all gifts by way of settlement to children, by men in affluent and prosperous circumstances, were rendered void upon a reverse of fortune, it would involve the ruin of their parents, and in many cases might prove more evil than that intended to be remedied. Nor will all voluntary conveyances be valid, for then it would be in the power of parents to provide for their children at the expense of their creditors. It is necessary that an actual or express intent to defraud creditors should be proved; for this would be impracticable in many instances. If the conveyance ought not to be established. * * * Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child, in consideration of love and affection, if the child is in prosperous circumstances, unembarrassed, and not over-indebted, and the gift is a reasonable provision for the child according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unincumbered for the payment of the grantor's debts; then such conveyance will be valid as to creditors existing at the time. But though there be

ent, yet if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or if the value of the estate to be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then such conveyance will be void as against creditors.

The latter branch of the rule was acted upon in Connecticut in *Wheeler v. Burnham*, 36 Conn. 469.

STATES IN WHICH THE DOCTRINE OF *SALMON v. BENNETT* HAS BEEN ADOPTED.—The rule laid down in *Salmon v. Bennett*, as to voluntary conveyances to children, has been adopted in Arkansas, Georgia, Illinois, Kansas, Maryland, Minnesota, Missouri, New Hampshire, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and the courts of the United States; and in Maine and Massachusetts is supported by dicta. It has generally been extended so as to embrace conveyances to wives: *Clayton v. Dempsey*, 17 Ga. 217; *Reed v. Davis*, 25 Id. 684; *Clayton v. Brown*, 30 Id. 490; *Koster v. Hiller*, 4 Bradw. 21; *Sweeney v. Damron*, 47 Ill. 450; *Goodman v. Wineland*, 18 Rep. (Md.) 622; *Kipp v. Hanna*, 2 Bland Ch. 1; *Filby v. Register*, 14 Minn. 391; *Walsh v. Ketchum*, 12 App. 580; *Patten v. Casey*, 57 Mo. 118; *Potter v. McDowd*, 31 Id. 62; *Ammon's Appeal*, 63 Penn. St. 284; *Carl v. Smith*, 8 Phila. 569; *Perkins v. Perkins*, 1 Tenn. Ch. 537; *Yost v. Hudiburg*, 66 Tenn. 627; *Morrison v. Clark*, 55 Tex. 437; *Alt v. Raguet*, 27 Id. 471; *Smith v. Vogdes*, 92 U. S. 183; *Ward v. Fulton*, 91 Id. 479; *French v. Holmes*, 67 Me. 186; *Winster v. Charter*, 12 Allen (Mass.) 606; as well as those to children: *Dodd v. McCraw*, 8 Ark. 83; *Smith v. Yell*, 8 Id. 470; *Clayton v. Dempsey*, 17 Ga. 217; *Patterson v. McKinney*, 97 Ill. 1; *Worthington v. Bullitt*, 6 Md. 172; *Worthington v. Shipley*, 11 Gill 449; *Smith v. Lowell*, 6 N. H. 67; *Brice v. Myers*, 5 Ohio 121; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Grotenkemper v. Harris*, 25 Id. 510; *Miller v. Wilson*, 15 Ohio 108; *Posten v. Sten*, 4 Wharton (Pa.) 27; *Chambers v. Spencer*, 5 Watts 404; *Wate v. Hissim*, 3 P & W. 160; *Burkey v. Self*, 4 Sneed (Tenn.) 1; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Brackett v. Hite*, 4 Vt. 384; s. c. 6 Vt. 411; *Church v. Chapin*, 35 Id. 223; *Row v. Wilmarth*, 9 Allen 386; *Laughton v. Harden*, 68 Me. 8; *Stevens v. Robinson*, 72 Id. 381; and the same principles have been applied in cases involving conveyances in consideration

of natural love and affection to grandchildren: *Bird v. Bird*, 1 Mo. 702; *Williams v. Banks*, 11 Md. 198. In New York the exception seems to be extended to conveyances to sons-in-law: *Abbott v. Tenney*, 18 N. H. 109; sons-in-law: *Smith v. Smith*, 1 Id. 459; and other near relatives: *Pomeroy v. Bailey*,

In a few of the cases in which conveyances to near relatives, leaving the grantor solvent, have been upheld against prior creditors, the courts have laid down the rule broadly that prior indebtedness is only presumptive and not conclusive proof of fraud, that fraud is a question of fact and not of law. Such is the language used by Mr. Justice SWAYNE, in *Lloyd v. Fulton*, 479, and *Smith v. Vodge*, 92 Id. 183, but such language must not be taken literally. An analysis and comparison of the cases show that the courts mean where they express themselves in this way, that mere indebtedness, regardless of the debtor's financial condition and the value of the property conveyed, is not conclusive proof of fraud. They do not mean that a voluntary conveyance which leaves the grantor insolvent will ever be upheld. There is no American case in which a voluntary conveyance, which leaves the grantor unable to pay pre-existing debts, has been held valid against prior creditors. And under the rule in *Salmon v. Salmon*, it is not sufficient for the grantor to retain property, the value of which is barely equal to the amount of his indebtedness. In one case where the debts amounted to \$6848, and the property reserved was worth \$7250, the reserved fund was held insufficient: *Black v. Sanders*, 1 Jones (N. C.) 67. In another, \$7250 was held insufficient to meet debts amounting to about \$7500: *Crumbaugh v. Kugler*, 2 Ohio St. 373. Property must be retained out of which all debts, together with the cost of collection, can be collected by process of law: *Church v. Chapin*, 35 Vt. 2.

GENERAL PRINCIPLES.—The underlying principle upon which those cases which hold all voluntary conveyances void against prior creditors, seem to proceed is, that all property possessed by a debtor, whether owned at the time he became indebted or subsequently, is a trust fund for the payment of his debts. The property held by him as a *quasi* trustee, with power to exchange it for other property, or sell it, or carry on business with it, or apply it to the payment of any particular debt, or the support of his family and himself, but having no right to diminish it by giving it away either to strangers or relations. Upon this fund every creditor has a claim.

considered to have a *quasi* lien ; a right to have as much of it as may be necessary to satisfy his claim applied to its payment when it becomes due.

Granting the correctness of this view it is evident that a voluntary conveyance by a debtor is an attempt to deprive his creditors their rights and is a fraud against them, and it is at once seen to be true that as Lord HARDWICKE said, "A man actually indebted, conveying voluntarily, always means to be in fraud of creditors." According to this view conveyances to children must be placed upon an equality with those to strangers.

A man may be tempted to steal, by a desire to benefit his wife and children, but if he yields to the temptation, the desire to benefit his family will not make his act honest. "I have always," says Lord HARDWICKE, "a great compassion for wife and children, but, on the other side, it is possible, if creditors should not have their debts, their wives and children may be reduced to want."

In those cases in which the view taken in *Reade v. Livingston* has been dissented from, the idea seems to be that a debtor has a right to do what he pleases with his property, so long as his object and intent are not fraudulent. Where this view is adopted the only remaining question is as to when, if ever, a fraudulent intent should be conclusively presumed. It is evident that if debtors have a right to give away their property, there is no reason why a fraudulent intent should be inferred from the mere fact of the existence of previous indebtedness, where a voluntary conveyance is made to a near relative, by one whose circumstances justify him in making it, and who retains property amply sufficient to pay his debts. Hence the latter theory be the correct one the rule in *Salmon v. Bennett* is unassailable.

BENJAMIN F. REX.

St. Louis.

RECENT ENGLISH DECISIONS.

Court of Appeal. Queen's Bench Division.

LEIGH v. DICKESON.

One tenant in common is not entitled to recover from his co-tenant contribution in respect of repairs done to the common property, although such repairs may have been reasonable and necessary. The proper remedy is by a partition suit, in which the court will take into account all proper expenditure upon the property.

The defendant was assignee of a lease granted by the plaintiff undivided three-fourths of certain premises to which the plaintiff was tenant in common with another. During the lease the defendant purchased a fourth interest of the plaintiff's co-tenant. On the expiration of the lease the defendant continued in the occupation of the above three-fourths as to the plaintiff. *Held*, that notwithstanding the tenancy in common the defendant was entitled to recover in respect of the use and occupation by the plaintiff undivided three-fourths.

APPEAL by the defendant from a judgment of POLLOCK, J.

In 1860, Mrs. Eyles (then Mrs. Worger) was entitled to a share undivided three-fourths of a house in Market-lane, Dover, in common with another; and on the 4th of January 1861, Mrs. Worger, by lease, let to one Prebble, for twenty years, a fourth interest at the rent of 33*l.* 15*s.* per annum. This lease contained a covenant on the part of the tenant to execute internal repairs, and, on the part of Mrs. Worger, to execute external repairs.

In 1865 the lease was assigned by Prebble to the defendant, who entered and paid rent. In 1871, the defendant purchased a fourth interest of the other tenant in common.

On the 6th of January 1881, the lease expired, and the defendant continued in possession. A correspondence then took place with a view to continue the tenancy, but the plaintiff refused. Mrs. Eyles, asking for an advanced rent, which the defendant was unwilling to pay, no further agreement was effected. In 1882 an action was then brought by the plaintiffs to recover from the defendant the sum of 24*l.* 9*s.* 6*d.* for the use and occupation of the defendant of three-fourths of the premises in Market-lane, Dover, during the days, at the rate of 33*l.* 15*s.* per annum, and also to recover the rent of a piece of land and buildings at the rear of it.

The defendant set up a counter-claim in respect of the cost of repairs, which he alleged he had expended in substantial and necessary repairs and improvements upon the premises.

The action was tried before POLLOCK, B., who, upon consideration, gave judgment for the plaintiff upon the claim for 24*l.* 9*s.* 6*d.*, and also upon the counter-claim.

The defendant appealed.

Finlay, Q. C., and *C. A. Russell*, for the appellants.

Grantham, Q. C., and *Gore*, for the respondents.

BRETT, M. R.—In this case the plaintiffs' *cestui quod tenent* were Mrs. Eyles, and defendant were tenants in common of a

endant has done certain repairs which may be taken to have been reasonable and necessary for the maintenance of the house. Thereupon he has paid the cost of the repairs, and has set up a counter-claim against the plaintiffs, the trustees of the co-owner, to recover her share, proportionate to her interest, of the money so expended. That is the substance of the counter-claim. Therefore this is a case in which one person has expended money, and thereupon another person seeks to recover that money. The question is whether the circumstances of the case will bring the case within any recognised principle of law which will entitle the defendant to recover against the plaintiffs. It is not pretended that there was any express request by Mrs. Eyles to the defendant to do the repairs or to expend any money on her behalf. What are the legal conditions which entitle a person, who has paid or expended money, to recover that money from another? If the plaintiff in such a case has expended money at the express request of the defendant, there can be no doubt. If the plaintiff has been appointed agent for the defendant in such a class of business as requires an expenditure of money in order to carry on the business, there is no doubt as to that. The law has gone further, and has said that, although there may be no request from the defendant to the plaintiff in point of fact, nor any act appointing him his agent, yet if the defendant requests the plaintiff to do that which will impose upon the plaintiff a liability, according to law, to pay money, then the law will imply from that request a promise that, if the plaintiff has laid himself under the obligation to pay the money, and has paid it, the defendant will repay the money. The law has lately been extended still further, and it has been decided that if you request a person to pay money in such circumstances that, though the law will not compel him to pay, yet that if he does not there will be an injury to him in his business or social position, even although that business is not recognised in law, the law will imply a promise to repay. That was an extreme case, in my opinion, but it was so decided. It is equally clear, however, that the law has always been that, for a mere voluntary payment, a person cannot compel repayment from any one else, and if the payment was merely voluntary you cannot make another person repay you, on the ground that your money was expended for his benefit, and that he has reaped the benefit of it. If one person pays money voluntarily for another in such circumstances that the other is at liberty to accept or reject

the advantage and he accepts it, then, although the payment was voluntary, he adopts and ratifies what was done for him and becomes liable. But if the money is voluntarily expended in such circumstances that the other is obliged to reap the advantage of it, then his accepting what he was not at liberty to refuse is no evidence of adoption or ratification, and therefore the other must suffer for his generosity.

The question is under which head this case comes. There is a house in which these persons have interests, which, although independent, are in fact combined. The defendant expended money on the property for the purpose of putting it into repair. That, in the first instance, was most certainly a voluntary payment. He was not requested, and there was nothing in the relation of the parties to give him an authority from the other to expend the money. They were not partners: there was nothing in their relation which made one the agent of the other. It was a voluntary payment on the part of the defendant, partly for his own interest, and partly for the advantage of his co-owner. But then it was an advantage which the other could not reject. Therefore the money was voluntarily expended by the defendant. It was an expenditure of which the plaintiff would get the advantage, but without the liberty to accept or refuse that advantage. Therefore the case is within the principle I have mentioned, and the money is not recoverable. At the common law it cannot be recovered as money paid. That is a legal remedy, and if it could be recovered in that way, a court of equity would never have interfered. But there is in this matter a remedy which is entertained by the Court of Chancery. When parties are joined together as co-owners, and they have come to a final disagreement, the Court of Chancery divorces them in a suit for partition, and then does justice between them. In such a suit, this expenditure would be taken into account and regulated between the parties. An old writ was cited which looked like a common-law writ. As far as I understand it, it would be a mandatory writ. I think the proper way to deal with it is to say that it is obsolete, because, as a common writ, it was unworkable, and therefore the matter went to chancery, there being no adequate remedy at law. They took possession of such matters only by writ of partition, and that is the only known remedy in such a case. The strongest evidence that that is so is that, having had the assistance of my learned brothers and of the counsel on both sides, no case has been found,

er at common law or in equity, where one co-owner has been e to pay, as this defendant requires the plaintiff to pay, except ase of a partition suit; and yet this very dispute must have raised over and over again, and probably is the reason why the t entertains partition suits. If any further reason can be re- ed, it is that, if we upheld such an action, it would enable a owner to put upon his co-owner expenses which he might be, reasons good or bad, unwilling to incur. I am, therefore, clearly opinion, that this counter-claim cannot be maintained, and that appeal must be dismissed.

ORTON, L. J.—I am of the same opinion. The action was to ver rent, and there was a counter-claim by the defendant for ain sums of money expended on the repair of the house. As ards the rent, I am of opinion that the plaintiffs are right. The ndant says that in ordinary circumstances one tenant in com- cannot recover rent from the other tenant in common in pos- sion. Both may enjoy the property, and the one in possession, ss the other is ousted, is not liable for rent. But here the de- ant was not originally tenant in common, but he was in posses- under a lease. After the expiration of the lease he continued ossession, and before the lease terminated there had been a cor- ondence about rent and a question as to what amount was to be . In those circumstances, when the defendant held continu- y under the lease, he must be considered as holding exclusive ession, and, therefore, he was in my opinion, properly held e to the plaintiffs for rent.

hen, as to the repairs, the question arises upon demurrer to the ement of defence. We cannot tell what the repairs were; but s stated that the house was in a bad state of repair, and that the ndant expended money in substantial and other proper repairs improvements upon the premises. I think we must take it that s of money were expended in necessary repairs for the purpose eeping the house in tenantable condition. As to the improve- ts, it was suggested that they should be allowed; but we need discuss that, because no tenant in common is entitled to improve mon property and then say that his co-tenant is to pay him the of improvements done without his request.

s to the repairs, no doubt where there are two persons under a mon obligation, and one discharges it, the other, on whose be-

half the money has been expended, is liable to him. But one of two tenants in common does not stand in that position to the other, even as regards necessary repairs. There being no suggested request, express or implied, I can see in principle no ground for saying that any common-law action will lie, nor that equity will allow any claim, except in the case I have mentioned, by one tenant in common against another for repairs.

It was suggested that in Fitzherbert's *Natura Brevium* there is a common-law writ of contribution as between tenants in common. On looking at it, however, I find that it assumes an obligation on tenants in common to do repairs, for at page 162 it says, "To the King and the sheriff * * * if A. shall make you secure * * * then summon * * * B. and C., that they be at W. to show wherefore, whereas they, the said A., B. and C., jointly hold a certain mill undivided in N., and are bound to the reparation and support of the same mill, and the said B. and C. * * * refuse to contribute to the reparation and support of the said mill, to the great damage of the said A., as he saith."

That, probably, may be a writ referring to a case where there was an obligation by tenure, or otherwise, to repair a mill, and one of the persons under such common obligation refused to fulfil it. But that does not apply to a case like the present. No doubt in Coke on Littleton (200b) we find he refers to the writ in this way:—"If two tenants in common, or joint tenants, be of a house or mill, and it fall in decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione facienda*, and the writ saith, *ad reparationem et sustentationem ejusdem domus teneatur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men." I cannot but think that he has mistaken the writ in Fitzherbert. If the sole owner of a house is not under any obligation to repair, I cannot see how joint owners are. In my opinion there arises no difficulty from the writ mentioned in Fitzherbert. It is not the case, however, that there is no remedy at all. There is no remedy so long as two tenants in common are willing to enjoy the property in its existing state. Unless there is an express or implied request the one cannot recover against the other. But there is a remedy in a partition suit. In the decrees in such suits it is common to have an inquiry whether one tenant has expended money in the repair or improvement of

property. So long as both parties are agreed to enjoy the property as tenants in common there can be no common-law action, therefore, no action in equity in order to make one contribute. Where one tenant in common desires to put an end to that state of things, and asks the other for a partition or sale of the property, the property is to be held in a different way; the money derived from the sale is directly increased by the expenditure incurred for the benefit or improvement of the property, or, if there is a partition of the property *in specie*, the property to be divided is increased. Therefore, if the property is to be divided and enjoyed in a different way, the one who has not contributed at all, and was bound to contribute, cannot take the property increased in value or the increase in the amount in money, without making an allowance to his co-tenant. It may be that it is considered that the partition has been done is adopted by taking the improved value or the improved state of the property in severalty. But it is confined to a partition suit. There is, therefore, a remedy which is available to tenants in common cannot agree, and it is a sufficient and only remedy.

MR. JUSTICE DICKESON, delivered a concurring opinion.

In this country also it is well settled at common law one tenant in common cannot recover of a co-tenant any amount expended in making repairs, however reasonable and necessarily from his relation as co-tenant without any express or implied promise: *Converse v. Ferre*, 3 Mass. 326, PARKER, C. J.; *Calvert v. Converse*, 99 Id. 74, in which a very satisfactory opinion is given by FOSTER, J. It would seem that no action at law can be maintained by one tenant in common against another for damages sustained by the defendant's neglect to repair; certainly not if there has been a previous request to repair, and no exclusive obligation on the defendant to make the repairs: *Doane v. Converse*, 12 Mass. 65; *Mumford v. Brown*, 475.

As to tenants in common, speaking, it seems still more obvious where two persons own in severalty

two distinct parts of a house; as when A. owns the lower portion, and B. the upper part, including the roof. In such case if A. refuses to join with B. in repairing the roof, and B. repairs it at his own expense, he cannot recover any part of such necessary expenditure from A.: *Loring v. Bacon*, 4 Mass. 574. And see *Chesborough v. Green*, 10 Conn. 318.

But the doctrine of contribution in equity is more ample than at law, and is founded on the principle that when parties stand in *æquali jure*, equality of burthen becomes equity. And so if repairs be made and paid for by one of the tenants for the common benefit of the others, in equity, they would be held to contribute ratably for such useful expenses. And not only would they be personally liable to contribution, but their estates also would be subject to a lien, whether the tenants agreed to repair or not, if by the repairs a common benefit

has been conferred on the owners, so that *ex aequo et bono* they ought to pay for such a benefit: 1 Eq. Cas. Ab. 291; Jeremy Eq. Jur. 86; *Percy v. Millandon*, 18 Martin 616; 2 Story Eq. Jur. § 1236; *Coffin v. Heath*, 6 Met. 80, WILDE, J.

2. The other point involved in the principal case is equally clear, that one tenant in common cannot ordinarily recover at law for the rent, or for the use and occupation of the whole premises by the other co-tenant, in the absence of any agreement, express or implied, that he would pay for such exclusive use; and on the familiar principle that each tenant in common owns the estate *per mi et per tout*; and if one co-tenant does not see fit to come in and occupy, the other still has the right to the enjoyment of the estate; and in such cases the sole occupation by one is not an exclusion of the other: *Sargent v. Parsons*, 12 Mass. 150; *Wilbur v. Wilbur*, 18 Met. 404. See also *Norris v. Gould*, 15 W. N. C. 187.

And this rule holds not only between the tenants in common themselves, but as to others holding under them. Therefore if one tenant in common leases "his interest" to a third person, and the latter enters under his lease, and occupies the whole premises, but does nothing to exclude the other co-tenant, and does not attorn to him in any way, and the latter makes no claim to be admitted into possession, he cannot recover anything of the defendant for use and occupation of the whole: *Badger v. Holmes*, 8 Gray 118.

But this does not militate with the decision in the principal case; since from the peculiar facts it was apparent the defendant was holding as tenant under his lease, and not in his subsequent capacity as tenant in common; whereas if he had lawfully surrendered his lease, and claimed to keep possession as tenant in common, probably a different result would have been reached.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Minnesota.

FISHBACK ET AL. v. VAN DUSEN ET AL.

When payment of the purchase-money and the delivery of the goods are expressly or impliedly agreed to be simultaneous, and the payment is omitted or refused by the purchaser upon getting possession of the goods, the vendor may reclaim them, the delivery being merely conditional. To constitute a conditional delivery, it is not necessary that the vendor should declare the conditions in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional.

A delivery on a sale for cash is not necessarily a conditional one, for the vendor may waive the conditions. Whether there has been such a waiver is a question of fact, viz.: Has the vendor voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition that the purchase-money must be paid before the goods pass to the vendee.

To constitute an *executed* contract of either sale, pledge or mortgage of goods, some specific property must be *appropriated* to the contract. Until this is done, the contract is merely *executory*, and no property passes to the vendee, pledgee or mortgagee.

emble, where a party delivers or deposits grain with another, with an agreement, expressed or implied, that the latter may use and dispose of it, and fulfil his obligation to the former by returning an equal amount of other grain of the same quality, the transaction, in the absence of a statute changing the rule, constitutes a *bailment*, and not a *bailment*.

APPEAL from a judgment of the District Court, Olmsted county.

Lloyd Barber, C. C. Wilson and Thomas Wilson, for appellants.

A. L. Gove, for appellee.

The opinion of the court was delivered by

MITCHELL, J.—When nothing is said in a contract for the sale of goods as to the time of payment, the law presumes that the sale is for cash. Upon a sale for cash, payment and delivery are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. Where payment of the purchase-money, or giving security for its payment and the delivery of the goods, are expressly or impliedly agreed to be simultaneous, and the payment or security is omitted, evaded, or refused by the purchaser, upon getting possession of the goods, the seller may immediately reclaim them; the title in such case not passing to the purchaser, the delivery being merely conditional, and the purchaser taking simply as trustee for the seller until the condition is performed. But where there is a condition made at the contract of sale favorable to the vendor, and solely for his benefit, he may, if he choose, waive it. Hence a conditional sale may become an absolute one by an unconditional delivery of the goods to the purchaser. By an unconditional delivery the title of the goods passes to the vendee. A cash sale is not necessarily a conditional sale. It is as competent for the vendor to waive the condition of payment concurrently with delivery, as any other condition in his favor: *Scudder v. Bradbury*, 106 Mass. 422. To constitute a conditional delivery, it is not necessary that the vendor should declare the conditions in express terms at the time of the delivery. It is sufficient if the intent of the parties that the delivery is conditional can be inferred from their acts and the circumstances of the case. Hence, after a conditional sale has been made, and a delivery has taken place upon the expectation that the purchase-money will be shortly paid, or the contemplated security given, the delivery would ordinarily be conditional without any express

declaration to that effect, because there is an implied understanding that the vendee will act honestly, and that he takes the goods subject to the contract. Therefore a sale does not, *ipso facto*, become absolute when a delivery is made, unaccompanied by any express declaration that it is conditional. Any such rule would be unreasonable, and greatly embarrass sales. 2 Kent 297; *Leven v. Smith*, 1 Denio 571; *Smith v. Dennie*, 6 Pick. 262.

But the doctrine is uniform and well established that if the vendor unqualifiedly and unconditionally delivers the goods to the vendee without insisting on performance of conditions, intending to rely solely on the personal responsibility of the vendee, the title passes to the latter, and the vendor cannot afterwards reclaim the property, even if the condition is never performed. His only remedy is upon the contract for the purchase-money: 2 Kent 296; Benjamin on Sales, § 320, note *d*; *Carleton v. Sumner*, 4 Pick. 516; *Smith v. Dennie*, *supra*; *Dresser Man. Co. v. Waterston*, 3 Met. 9; *Farlow v. Ellis*, 15 Gray 229; *Goodwin v. Boston & L. R. Co.*, 111 Mass. 487; *Scudder v. Bradbury*, 106 Id. 422; *Haskins v. Warren*, 115 Id. 514; *Freeman v. Nichols*, 116 Id. 309; *Bowen v. Burk*, 13 Penn. St. 146; *Mixer v. Cook*, 31 Me. 340. The weight of authority seems to be that a delivery, apparently unrestricted and unconditional, of goods sold for cash, is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser. *Scudder v. Bradbury*, 106 Mass. 422; *Upton v. Sturbridge Cotton Mills*, 111 Id. 446; *Hammett v. Linneman*, 48 N. Y. 399; *Smith v. Lynes*, 1 Seld. 43; *Farlow v. Smith*, *supra*. No secret or undisclosed intent of the seller is of itself sufficient to make the delivery conditional. This is not enough to make the purchaser a trustee of the vendor. *Upton v. Sturbridge Cotton Mills*, *supra*. Waiver is a voluntary relinquishment of some right, which, but for such waiver, the party would have enjoyed. Hence voluntary choice is of the essence of waiver, and not mere negligence, though from such negligence, unexplained, such intention may be inferred. Hence the important question, in determining whether there has been a waiver of a condition of sale, is: Has the vendor manifested by his language or conduct, an intention or willingness to waive the condition, and make the delivery unconditional and the sale absolute without having received payment or the performance of the conditions of sale? This must depend on the intent of the parties at the time,

ascertained from their conduct and language, and not from the fact of delivery alone. Whether there has been a waiver is a question of fact. It may be proved by various species of evidence: declarations, by acts, or by forbearance to act. But, however proved, the question is: Has the vendor voluntarily and unconditionally delivered the goods without intending to claim the benefit of the condition? *Fuller v. Bean*, 34 N. H. 290-303; *Smith v. Smith*, *supra*; *Farlow v. Ellis*, *supra*; *Hammett v. Linneman*, *supra*.

In the case at bar, the court has found that the sale by Van Dusen & Co. to Cole was for cash; but he also finds that all the wheat delivered to Cole was so delivered to him *absolutely*, without reserving upon payment at the time of delivery, no condition, express or implied, being annexed to the delivery. If this is justified by the evidence, it is, under the rules of law already announced, conclusive against the right of Van Dusen & Co. to reclaim the wheat because of non-payment of the purchase-money. We shall not attempt to state the evidence. The substance of it is very fairly and succinctly stated in the findings of fact by the court.

The contract between the parties not having been in writing, and Cole being dead, the evidence was, necessarily, mostly circumstantial, consisting largely of facts showing the course of dealing between the parties in reference to this and numerous other prior and subsequent transactions. Payment had never been insisted upon at the time of delivery. The delivery of grain in this, as well as former cases, was apparently unrestricted and unconditional: at least, it was never accompanied by any express declaration that it was conditional. According to the usual course of dealing between the parties, it appears that while Van Dusen & Co were accustomed to deliver to Cole their bills from time to time, as one or more car-loads of grain were delivered, yet immediate payment was never insisted upon—payment being made in whole or in part, from time to time, as was convenient; sometimes within a day or two, sometimes not for weeks or months after the delivery of the grain.

The evidence shows that Cole bought wheat exclusively to be ground in his mill. It also tends to show that he never kept it for sale from other wheat until paid for, and that he was accustomed to use it by grinding it up at any time after delivery without reference to whether he had paid for it or not. From the situation of the

parties it is almost impossible that Van Dusen & Co. were not fully aware of this mode of dealing with the wheat by Cole. In fact the evidence tends strongly to prove that they perfectly understood it. Cole's standing was good, and it appears that Van Dusen & Co. had entire confidence in his personal responsibility. Such a state of facts amply sustains the finding of the court to the effect that the delivery of the grain to Cole was absolute and unconditional, and was intended to be such, and that Van Dusen & Co. had no expectation of asserting the condition of payment before the title should pass, but, on the contrary, relied solely upon the vendee's personal responsibility. Van Dusen & Co. also contend earnestly that the sale and delivery of the whole 12,000 bushels was an entirety, and the payment also to be an entirety upon the delivery of the whole, and therefore that the delivery was not complete when Cole died, and hence there could have been no waiver of conditions as to the part delivered. This theory of the transaction is entirely at variance with the course of dealing between the parties, both in reference to this and prior sales. While it is true that the bargain for the purchase of the 12,000 bushels was a single contract, yet it was evidently the understanding of the parties that it was to be delivered in instalments of one or more car-loads, the purchase-money for which was payable at any time on demand after delivery, without reference to whether the whole amount contracted for had or had not been delivered. It was precisely on this theory that Van Dusen & Co. acted in reference to this very transaction, for if their present theory be correct there was nothing due until the whole 12,000 bushels was delivered. The grain being thus deliverable, and to be paid for in instalments, the delivery of each instalment was just as complete as if no more remained to be delivered. The evidence fully warranted the court in finding that the wheat was to be delivered and paid for in car-load lots, as it should arrive from the several warehouses of the vendors. And this finding is fairly within the issues made by the pleadings.

This brings us to the consideration of the claims of the defendant banks. The facts as found by the court are as follows; Cole was a miller operating a flouring-mill, and engaged in purchasing wheat and manufacturing it into flour, and shipping and selling the same. He was not a general warehouseman, and had no warehouse except an elevator, which was a part of his mill. His principal and exclusive business was that of miller, although, as an

lent to that business, he was accustomed to receive into his mill farmers, for storage, wheat, until such time as they desired to it, issuing to them therefor the usual storage or warehouse receipts. In 1880 twenty-five persons so stored wheat with him; in 1881, twenty-one; in 1882, four; in 1883, two. He never delivered, or shipped wheat out of his mill, or redelivered any wheat left with him for storage, but all wheat thus received into his mill was ground up, using it as a part of his current stock in his business of milling. In April 1882, he borrowed \$5000 from the First National Bank of Winona, for which he gave his note, and at the same time executed and delivered to the bank the following instrument: "Received in store, for account of First National Bank of Winona, 5000 bushels of No. 2 wheat, deliverable to them or their order on return of this receipt: provided, always, that if a note, bearing even date, and due July 9, 1882, for \$5000, has been paid, this receipt is null and void, otherwise in full force." In May 1882, he had a precisely similar transaction with the Second National Bank, except that the loan was \$3000, and the instrument in the form of a receipt which he gave, did not contain the proviso contained in the other. Neither loan was ever paid. The instruments were, and by all parties were intended to be collateral security for the repayment of these loans, and for no other purpose. Otherwise than as above stated, Cole never sold any wheat to these banks, nor did the banks ever store any wheat with him, or deliver any wheat to him, and never had any wheat in his possession. Between August 2 and 8, 1882, the mill was entirely run out of wheat, so that on the 8th of August there was no wheat of any kind in the mill that had been placed there prior to that date, the whole having been ground into flour in the usual course of operating the mill.

The court does not find, and there was no evidence tending to show, that there was any wheat in the mill at the date of either of these transactions with the banks. The wheat found in the mill at the time of Cole's death, which is the wheat here in controversy, was purchased by him from defendants, Van Dusen & Co., and others, subsequent to August 8th 1883. It seems to us that to state these facts is to prove that the banks cannot maintain their claim to this wheat. The act of 1876, commonly known as the "Warehouse Receipts" (Gen. Laws 1876, c. 86, or Gen. St. 1878, p. 1012), has no application to such transactions. The banks never actually deliv-

ered any wheat to Cole for storage. They never bought any wheat of him, and he never sold them any. All that can be possibly claimed is that he executed these receipts for the purpose of pledging or mortgaging his own wheat to the banks as security for his own debt. Now the act above cited, as its title and contents clearly indicate, was designed to protect the rights of actual depositors—those who deliver grain to another for storage. The act is too long to quote *in extenso*, but its language throughout shows that this was its exclusive scope and purpose. The very first expression in the first section furnishes the key to the whole act, viz.: “Whenever any grain shall be delivered for storage.” Such expressions as “whenever any grain shall be deposited,” “the person so storing,” “the amount of grain so stored,” “the terms of storage,” “charges for storage,” and like expressions, are to be found all through the act. But aside from the strict letter of the act, its provisions as a whole, the evil sought to be removed, and the remedy sought to be applied, clearly show that it was never in the legislative mind that it should apply to transactions where there was in fact no deposit of grain for storage, but simply an attempt by a party to pledge or mortgage his own property in his own possession to secure his debt. To extend its application to such transactions would practically result in important modifications of the law of pledges and mortgages of personal property,—a thing not to be presumed to have been contemplated by the legislature. We do not mean to say that a vendor may not become the bailee of the vendee, so as to bring the transaction within the statute. It might with force be claimed that there would be no substantial reason for requiring the parties in such a case to go through two ceremonial deliveries. But that is not this case. To bring a case within the provisions of this statute there must be a delivery by an actual depositor. See *Greenleaf v. Dows*, 8 Fed. Rep. 550; *Adams v. Merchants' Bank*, 2 Fed. Rep. 174.

Therefore, in our judgment, this statute has no application to the present case, and hence the rights of the banks must be determined according to common-law principles alone. If these transactions amounted to anything, it was either as a pledge or a mortgage. For the purposes of this case it is immaterial which it be called. One of the counsel for the banks avoids stating which of the two he claims to be. The attorney of record claims it was a pledge. We are inclined to think it was an attempt to create a

dge; and as that is the view most favorable to the banks, we will consider the case from that standpoint.

We shall assume (without deciding the question) that a *warehouseman*, having property of his own in his warehouse, may pledge as security for his own debt by merely issuing to his creditor an instrument in the form of a warehouse receipt. This is, certainly, as far as any authority goes. We will also assume that Cole was, within the meaning of the authorities, a "warehouseman," which is a very much doubt. But conceding these, still there never was any executed contract of pledge, because no specific property was ever appropriated to the contract so as to pass title to the pledgee.

It is an elementary principle of law, applicable alike to sales, mortgages and pledges, that the contract becomes executed only by identifying the goods to which it is to attach; or, in legal phrase, the *appropriation* of the specific goods to the contract. Until this is done the contract is executory, and the property does not pass. There was no such appropriation of any specific grain to these contracts, even under what may be termed the modern American doctrine, that where the mass, from which the sale, mortgage or pledge is made, is uniform in character and quality, as wheat in an elevator, separation from the mass is not necessary to constitute an appropriation of the property to the contract. But in this case, out of what mass was this wheat to be taken? There is no evidence that there was any wheat in the mill when these receipts were executed, and if there was, there is nothing to show that it was the wheat referred to. So far as appears, the banks might have an equal propriety claim any other wheat situated elsewhere. But even if it be further conceded that there was, at the dates referred to, wheat in the mill, and that this was the wheat referred to in the receipts, yet there is still a conclusive reason why the banks cannot recover. As found by the court, Cole was accustomed to use all the wheat in his mill as a part of his stock in the milling business, grinding it into flour, which he shipped and sold. This appears to have been his usual and long-continued practice. In view of this fact, and also the well-understood usages of the grain trade as to the time within which it is ordinarily marketed, it could never have been in the contemplation of the parties that Cole would keep this wheat on hand from the spring of 1882 until the late summer of 1883. The banks must have under-

stood that Cole would, and tacitly assented that he might, use and grind up this wheat, and ship and sell the flour. The most that can be claimed for the transaction is that he was, on demand, to deliver to the banks out of his stock an amount of wheat corresponding in quantity and grade to that named in the receipts. Even if they had actually deposited their own wheat with Cole, under such circumstances, it hardly needs the citation of authorities at this day to the proposition that it would have, in the absence of a statute, constituted a sale and not a bailment. The very object of the statute already considered was to change the rule in this regard as to actual depositors. See *Rahilly's Case*, 3 Dill. 420; *Chase v. Washburn*, 1 Ohio St. 244; *South Australian Ins. Co. v. Randell*, L. R., 3 P. C. App. 101.

No case to which we have been referred goes far enough to support the claim of the banks on the facts of this case. In almost all of them we think it will be found that not only was specific property appropriated to the contract, but the identity of the subject of the pledge was preserved. *Merchants' Bank v. Hibbard*, 48 Mich. 118, which takes quite advanced positions on some questions, comes nearer supporting the claim of the defendants than any case we have found. But the identity of the property pledged with that claimed seems to have been assumed or taken for granted. On no other theory, we think, could the result in that case have been reached. In the case at bar, all wheat in the mill had been removed between August 2d and 8th, and the wheat in dispute purchased by Cole subsequent to the latter date. Our conclusion is that the banks have no title to the wheat, and have no right to any preference over other creditors of the estate in the distribution of its proceeds.

Judgment affirmed.

The principles stated in the opening sentences of the opinion, that the law presumes a sale to be for cash when nothing is said to the contrary, and that upon a sale for cash, payment and delivery are concurrent and mutually dependent acts, are well recognised. But the condition of payment may be waived. In *Scudder v. Bradbury*, 106 Mass. 422, 428, the trial judge instructed the jury, "that a cash sale might or might not be a conditional sale; that it was not necessarily in law either a conditional or an

unconditional sale; and that it was for the jury to determine upon the evidence whether the sale was conditional or not." This ruling was sustained by the Supreme Court of the state, as applied to the facts of the case, in which the sale was accompanied by a delivery. Such language is confusing. When a sale is made for cash, the right to demand the money immediately upon delivery, and to reclaim the goods if the money be not forthcoming, always exists; but, of course, if delivery is voluntarily made without pay-

being insisted on, and without being secured by artifice or fraud, the condition is waived.

the terms are "cash in ten days" is evident that payment is not expected concurrent with delivery, and upon absolute delivery there is no right to reclaim the goods if the payment be not made at the expiration of the ten days: *Wells v. Warren*, 115 Mass. 514.

It is very necessary to distinguish sales of cash from sales on condition that the goods shall not pass until the price is paid. In many of the states such conditional sales are recognised and held valid even as to innocent third parties, while in others they are held void as to creditors of the vendee and *bona fide* purchasers from him. See *Lewis v. McCabe*, 21 L. Reg. (N. S.) 217, and note. The law in regard to cash sales seems to be universal. And it is evident that the vendor, in the case of a cash sale, who has made a contract entitling him to payment as soon as his goods are delivered, should not be allowed, after waiving the condition of immediate payment, and retaining for his money to the personal credit of the vendee, no matter how soon a mistake is discovered, to turn around and contend that he made the delivery on condition that the title would not pass until the price was paid; even though the law of the state in which the transaction occurred would have permitted him to make such a contract instead of the contract he did make. See the dissenting opinion in *Hammett v. Linneman*, 100 N. Y. 406. But it is of course possible that upon the vendor coming to the aid of the vendee in the case of a cash sale and insisting that payment will not follow delivery, the contract between them may be abandoned, either expressly or by implication, and another entered into by which delivery is to be made at once, but the title is not to pass until payment of the price. See *Nash v. Weaver*, 23 Hun

in note (d) to sect. 320 of the Fourth American ed. of Benjamin on Sales. See also *Evansville, &c., Rd. Co. v. Erwin*, 84 Ind. 457.

On the question of the necessity of separation in the case of a sale of a portion of a homogeneous mass, a late case in New Jersey, which was differently decided by the Supreme Court and the Court of Errors and Appeals, was reported each time in the pages of this magazine, and each time with a note opposed to the decision: *Hires v. Hurff*, 17 Am. L. Reg. (N. S.) 11, and *Hurff v. Hires*, 18 Id. 161. The recent date of these discussions and their fullness, render it unnecessary to take up here that general question.

In the principal case the question was as to the pledge, by means of what purported to be a warehouse receipt, of a portion of a mass, of uniform character and quality, by the owner, a miller, and it was decided that his retained power over the wheat in question was so extensive as to be inconsistent with there having been any pledge of it.

Under the facts of the case probably no fault will be found with the decision, although it may be said that it might preferably have been put on the ground that Cole was not a "warehouseman;" Cole's course of business was such that his depositors could not have considered him under any obligation to keep on hand wheat of such kind and quantity as to answer all his outstanding receipts, and therefore a deposit with him must be looked upon as a sale and not a bailment; but so far as the opinion states or implies that the right of the warehouseman to substitute for the wheat deposited, wheat of like quality, keeping on hand always the requisite quantity, will make the transaction a sale and not a bailment, it is not in accordance with what would seem to be the better doctrine. See the elaborate note of Mr. (now Judge) HOLMES, to *Chase v. Washburn*,

any cases on this subject are collected

6 Am. L. Rev. 450; *Sexton & Abbott v. Graham et al.*, 53 Iowa 181; *Nelson v. Brown et al.*, Id. 555.

Some of the cases while admitting the power of an owner to sell his own goods, without segregation and without actual delivery, deny him the power to so *pledge* them; it is proposed in this note to examine a few typical cases, with a view of determining the correctness of this attempted distinction.

Gibson v. Stevens, 8 Howard 384 (1850), a part of the syllabus of which is as follows: "Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee.

"Where articles of commerce were purchased in the state of Indiana, and the vendors in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

"These documents, being endorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.

"Therefore, an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained."

Gibson, the merchant in New York, was, by his contract, to sell the stuff, repay himself and turn over the balance, less commissions and charges, to the original purchasers, McQueen & McKay. TANEY, C. J., says: "Nor, as respects the legal title, can there be any distinction between the advance made

by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances. * * * The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an *equitable interest* in the surplus, if any remained after satisfying the claim of Gibson."

It was not denied that the equitable interest of McQueen & McKay was liable to attachment, but the decision was that Gibson was entitled to the *possession* of the goods. The goods were in the warehouses of third persons. It is submitted that this case, properly understood, is a decision recognising the validity of a *pledge* of merchandise by a symbolical delivery thereof by means of the transfer of a warehouse receipt.

To show the nature of the transaction when there is such a symbolical delivery of property in pledge, the following extract from the opinion of BRADLEY, J., in *Casey v. Cavaroc*, 6 Otto 467 (1877), is of interest: "The difference ordinarily recognised between a mortgage and a pledge is, that title is transferred by the former, and possession by the latter. * * * The possession need not be actual: it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In such cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also. In such a case there is a union of two distinct

of security—that of mortgage and of pledge; mortgage by virtue of title, and pledge by virtue of the possession.”

Yenni v. McNamee, 45 N. Y. 614, 11, S. was the owner and in possession of a quantity of petroleum at his refinery. His superintendent signed and delivered to him the following receipt,

Dec. 6th 1866: “Received on charge for account of S., 600 barrels of petroleum, crude and refined, contained in tanks, and 700 barrels to hold the same; deliverable to his order on payment of the charge named therein, in accordance with the marginal note hereto. \$1000 per month. Labor, .”

The receipt was not for any designated separate parcel of oil, but was intended to cover oil, crude, refined or in process of refining in the works, and empty barrels to hold it. On the 16th of Dec. the National Bank loaned Stokes \$5000 and secured his note therefore and, as collateral security, took the receipt above set out endorsed by him. There was no actual possession of the oil; none of it was set apart to answer the call of this note; and no one, on behalf of the bank, ever saw the oil. An execution was issued against Stokes and the sheriff’s assistant in this case, levied on all the oil, barrels, &c., in the works. The bank was authorized by the bank to take the oil covered by the receipt, on their part, and, after the levy, sold and delivered the oil in question, which the sheriff reclaimed, and to recover which this action was brought.

CHIEF JUSTICE, says: “The inquiry is, whether the bank acquire an absolute title to the property by the endorsement of the receipt to it by Stokes, so that it was not afterwards liable to be levied upon and sold upon an execution against him.* * * There is no doubt but that Stokes intended to confer some title to the property by endorsing and delivering the receipt to the bank, by accepting it, intended to acquire an interest in the prop-

erty. Although the mode adopted was informal it was, I think, effectual to accomplish the object of the parties. A transfer of a warehouse receipt by indorsement, with intent to transfer the title to the property specified therein, is effectual under the law merchant, independent of the statute, to transfer the title: [*Gibson v. Stevens*, 8 How. U. S. Rep.] Had Stokes, therefore, indorsed and delivered the receipt to the bank in good faith, upon an absolute sale of the property to the bank, I am not prepared to say that the bank would not thereby have acquired the title, although the receipt was a mere fiction between Stokes and Chapman. Both of the latter would have been estopped from denying that the receipt was based upon a real transaction. This estoppel would have been equally effectual against all claiming under Stokes upon a title subsequently acquired. * * * But Stokes transferred the receipt, and, therefore, the title to the property, as a mere security for the payment of his note. It was therefore a mere mortgage security,” and void as against creditors, because not accompanied by immediate delivery, or filed as required by the state statute. See to same effect *Farmers & Mechanics’ National Bank v. Lang*, 87 N. Y. 209, (1891). (See, however, *Parshall v. Eggert*, 54 N. Y. 18). *Adams, Assignee, &c. v. Merchants’ National Bank*, 2 Fed. Rep. 174, and 19 Am. L. Reg. (N. S.) 714, opinion by DRUMMOND, J., is a very similar case.

In *Smyth v. Craig* (1841) 3 W. & S. 14, S., the defendant, bought and received from C., B. & Co. flour, to be paid for half in cash and half in 60-day notes. Being pressed for payment he consented to let molasses in his distillery stand either as their property or as collateral security on condition that they would take his notes at 60 and 90 days, in lieu of the former terms. He pointed out the molasses, consisting of 400 hogsheads, to be ascertained by counting them off, in rows, from a particular place, and in

a particular manner. He agreed that the molasses should remain in his yard, and to send them the rum to be distilled from the molasses, to be sold by them and applied to his debt. GRISON, C. J. : " Had it rested there, the plaintiff, or the firm he represents, could not have recovered as in the case of a pawn : for at this time there was no delivery of possession, and consequently no pawn. Indeed, retention of possession was necessarily a part of the arrangement, because it was indispensable to enable the defendant to carry the other parts of it into effect."

Merchants', &c., Bank v. Hibbard, (1882) 48 Mich. 118. In this case there was issued by the defendants as security for a loan of \$20,000 made to them by the bank, the plaintiff, the following warehouse receipt: " Received, Grand Rapids, Michigan, January 17, 1880, in store for account of the Merchants' and Manufacturers' National Bank of Detroit, Michigan, eighteen thousand (18,000) bushels No. 1 white and 2 red winter wheat, to be delivered in wheat or its equivalent in flour upon return of this receipt properly endorsed, to be kept insured for account of whom it may concern. HIBBARD & GRAFF."

H. & G. were not only buying, storing, manufacturing, shipping and selling wheat on their own account, but were also receiving into their mills wheat to be stored for others, for which they issued the customary warehouse receipt. The firm of Hibbard & Graff failed in March 1880, and the bank sued out this writ of replevin. COOLEY, J., says, " The defendants do not deny that title may pass by the delivery of a warehouse receipt in pursuance of an actual sale, nor, as we understand it, do they dispute that when one is owner of property represented by a warehouse receipt or other instrument of a similar nature, he may make pledge of it and transfer constructive possession by delivering to the pledgee the instrument that represents his property. * * * But in this case the plaintiff never had

either title or actual possession of the property; it was not intended that the warehouse receipt should pass the title to the plaintiff. It is therefore contended that there was and could be in the case no constructive possession except such as might be implied in any case in which an owner should undertake to pledge the property, and at the same time without delivery retain it in his own hands and under his own exclusive control.

" We have already said that it is conceded a warehouseman may transfer title to property in his warehouse by the delivery of the customary warehouse receipt. In such cases there is no constructive delivery of the property whereby to perfect the sale except such as is implied from the delivery of the receipt; and where the property represented is only part of a large mass as was the case here, there could not well be any other constructive delivery. But for the convenient transaction of the commerce of the country it has been found necessary to recognise and sanction this method of transfer, and vast quantities of grain are daily sold by means of such receipts. * * * We are then to see whether a constructive transfer of possession that is recognised in the case of sale shall be held inoperative in case of an attempted pledge.

" If a distinction is made in the cases it ought to be upon some ground that would seem reasonable in commercial circles. * * *

" If a merchant may buy grain in store and receive a transfer of title in a warehouse receipt, he would be very likely if he had occasion to receive grain in pledge, to suppose a similar receipt to be sufficient for that purpose. No reason would occur to him why it should be otherwise, and this because there would be in fact no reason except one purely technical, depending on nice legal distinctions. When that is found to be the case any proposition to establish a distinction should be rejected, decisively and with-

hesitation; for the laws of trade are made and exist for the protection and convenience of trade, and they should not create rules which have the effect to render the chambers of commerce with all pitfalls. * * *

Some stress was laid by the defendant upon the fact that two kinds of wheat are mentioned in the receipt, and there is no specification of the quantity of each to be held. The circumstances sustain this, for they show that the two kinds were mixed in grinding, and it was evidently contemplated that flour made of either than wheat should be held. In the absence of any specification of the quantity of each kind that was to be held, the legal construction we think should entitle the pledgee to an equal amount of each kind if it remained unmanufactured. The return of the officer shows that he found no red wheat, and 3051 bushels of white wheat. For the remainder he took an equivalent in wheat according to the terms of the receipt."

See also *Cochran v. Ripy*, 13 Bush (Ky.) 495; *Ferguson, Jr., Assignee, v. Northern Bank of Kentucky*, 14 Id. 555; *Bank v. The Bank*, 11 Ohio St. 311; *Bank v. Cutler*, 17 Wis. 351; *Whitney v. Bank*, 18 Id. 359; *Shepardson v. Bank*, 29 Id. 34; *Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219; *Cool v. Phillips*, 66 Ill. 216; *Taylor v. Turley*, 87 Id. 296; *Osborn v. Koenigheim*, 1 Tex. 91; *Dougherty v. Haggerty*, 96 N. St. 515.

The conclusions which the writer deduces from his examination of the authorities, are, First: That while possession by the pledgee is a necessary condition of

the existence and continuance of a pledge, yet that that possession is not required to be actual physical possession. The holding of a recognised symbol of title, a bill of lading or a warehouse receipt is sufficient. And the owner of goods, if a warehouseman, can pledge the same by delivering his own warehouse receipt to the pledgee.

The qualification of this last proposition, that the pledgor must be a warehouseman, seems to have been overlooked in the consideration given by the judges deciding them to some of the cases cited. That the pledgor is a warehouseman and the instrument, a warehouse receipt should be shown by pleadings and proof. *Shepardson v. Cary, supra*; *Thorne v. First Nat. Bank*, 37 Ohio St. 254.

Second: That segregation from a uniform mass is no more required in the case of a pledge by means of the transfer of a warehouse receipt, than in the case of a sale thereby. Where the pledgor is a warehouseman, the world has notice from that fact that the legal possession of the goods in his warehouse is probably in another, although the physical possession and control of them is in himself: if he be not a warehouseman and yet desire to pledge bulky articles not easily susceptible of actual delivery, he must, at least, clearly and unequivocally designate the articles pledged, so that third persons need not be deceived. *Anderson v. Brenneman*, 44 Mich. 198; *Reeder v. Machen*, 57 Md. 56; *Collins v. Buck*, 63 Me. 459; *Thompson v. Doliver*, 132 Mass. 103; *Crawford v. Davis*, 99 Penn. St. 576.

BENJAMIN H. LOWRY.
Philadelphia.

United States Circuit Court, S. D. Ohio.

BANKS ET AL. v. MANCHESTER.

A statute appointing a state reporter, authorizing the secretary of state to contract for the publication of his reports and giving to the contractor the exclusive right to

publish the same confers no right to copyright, nor any exclusive right to publish, the opinions of the court.

Quere, whether the state, through its reporter, can secure a copyright in the opinions of its judges.

IN CHANCERY. Hearing on bill and answer.

SAGE, J.—The complainants, partners under the style of “Banks Brothers,” and law-book publishers at the city of New York, are contractors with the state of Ohio for the publication of forthcoming volumes forty-one and forty-two, Ohio State Reports. They seek to enjoin the defendant, who is the proprietor and publisher at Columbus, Ohio, of the “American Law Journal,” from publishing therein any of the decisions and opinions of the judges of the Supreme Court of Ohio, or of the Supreme Court Commission of Ohio, in cases which are to be reported in either of said volumes.

It appears from the bill that under arrangements made with the complainants by the proprietor of the “Ohio Law Journal” and the “Weekly Law Bulletin,” copyrighted advance publications of said decisions are made at Columbus in supplements to those periodicals. The copyrights are secured by the official reporter in pursuance, it is averred, of the duties of his office, and for the benefit of the state of Ohio, and the protection of the rights and interests of the complainants under their said contract.

The complainants charge that the defendant has unlawfully infringed said copyrights by republishing said decisions, and that he has declared to them in writing his intention to continue so to do; wherefore they pray that he may be restrained by injunction.

The respondent answers admitting the publication of the opinions and decisions referred to in the bill, but avers that they are solely and exclusively the productions of the judges of the Supreme Court of Ohio, and of the Supreme Court Commission of Ohio, that the judge to whom the duty is assigned to prepare an opinion, prepares also the statement of the case and the syllabus, the latter being subject to revision by the judges concurring in the opinion; that the duty of the reporter is limited to preparing abstracts of arguments of counsel, tables of cases, and indexes, reading proof, and in arranging cases in their proper order in the volumes of reports of said courts, for all which he is paid out of the treasury of the state a stated annual salary, fixed by the law, and that he has no pecuniary interest in the publication of said reports. The respondent admits that he intends to continue said publications, but denies that the reporter has any right or authority to secure a copyright

the publications described in the bill, or that said copyright secured by him for the benefit of the state of Ohio or for the protection of the rights of the complainants.

The respondent also avers that complainants, for the consideration of \$100, contracted with the proprietors of the "Ohio Law Journal" and of the "Weekly Law Bulletin" to give to them the exclusive right to publish in said periodicals said opinions and decisions, and to protect said pretended right by commencing and prosecuting at their own cost such suits as might be necessary therefor, and that therefore the complainants have no interest in the result of this controversy.

The provisions of the statutes of Ohio bearing upon the question involved are referred to in the bill and in the answer.

The cause came on for hearing on the bill and answer.

Sect. 437, Revised Statutes of Ohio, empowers the secretary of state when authorized by resolution of the general assembly to contract with any responsible person or firm to publish the reports authorized by law, and to furnish for the use of the state the number of copies required to supply the state, at a cost not to exceed \$1.00 per volume, and the number of copies required to meet the demands of the citizens of the state, at a cost not exceeding \$1.75 per volume: also to furnish advance sheets as provided in sections 430 and 431. Sect. 437 further provides that "such contractor shall have the sole and exclusive right to publish said reports, so long as the state can confer the same," during the period of the contract.

Sects. 429-435 provide for the printing and binding of the volumes of reports under the direction of the supervisor of public printing. These sections do not apply when, as in this case, the secretary of state is authorized to make the contract as provided in section 437.

Sect. 436 requires the reporter to secure a copyright for the use of the state for each volume of the reports published under the provisions of sects. 429-435, but the duty of the reporter is limited to securing a copyright "for each volume of the reports so published." No such duty is imposed upon him with reference to volumes published under contracts made by the secretary by virtue of the provisions of sect. 437. Under that section—which applies in this case—the sole and exclusive right to publish the reports, so far as the state can confer the same, is granted to the contractor. Nowhere

in the statute law relating to the publication of reports is authority given to the reporter or to any other person to acquire a copyright in the decisions or opinions of the judges. This is significant in view of the unanimous opinion of the justices of the Supreme Court of the United States in *Wheaton v. Peters*, 8 Pet. 668, that no reporter has or can have any copyright in the written opinions delivered by that court. The legislation in the state of Ohio must be considered to have been enacted with reference to that opinion, and therefore to have been intended to limit the provisions above cited to the volumes of reports, and to exclude copyrights of the opinions of the judges. It is in accordance with sound public policy, in a commonwealth where every person is presumed to know the law, to regard the authoritative exposition of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publication may be of everything which is the work of the judge, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter—that is to say, the indexes, the tables of cases and the statement of points made and authorities cited by counsel. *Wheaton v. Peters*, 8 Pet. 653; *Little v. Gould*, 2 Blatchf. 165 and 362; *Chase v. Sanborn*, 4 Clifford 306; *Myers v. Callaghan*, 5 Fed. Rep. 726; s. c. 10 Bissell 139; *Myers v. Callaghan*, 20 Fed. Rep. 441.

Counsel for complainants cite Judge DRUMMOND'S dictum in *Myers v. Callaghan*, 5 Fed. Rep. 728, that "if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then whatever property there was in the volumes arising from the labors of the reporter ought to belong to the state and not to him."

"Now," says counsel, "in Ohio the state undertakes to pay the reporter 'adequate compensation,' and by the statute that amount is all he can receive. He has no perquisites. The theory is that the state pays him for his labor, and that the result of his labor belongs to the state."

And counsel proceed to claim that "this is precisely the theory upon which the state is entitled to the decisions of the judges. They are paid a stipulated price or sum for their services, and this by their consent—impliedly given when they accept the

—is in full of their services, and the result of their labors is property of the state." Mr. Drone, in his work on Copyright, § 161, states substantially the same view, although he says he has seen no sound clear exposition of the law governing copyright judicial decisions, and that it has not been expressly declared in any modern case that copyright will vest in a judicial decision. Mr. Justice STORY, one of the judges who concurred in the decision in *Leaton v. Peters*, said (in *Gray v. Russell*, 1 Story 21), that it was held in that case that the opinions of the court, being published under the authority of Congress, were not the proper subject of copyright, it was as little doubted by the court that Mr. Leaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work.

Whether the state, through its reporter, can secure a copyright in the opinions of its judges is, however, not a question arising, nor can it be decided in this case. It is sufficient to say that the state has not adopted legislation for such copyright, that the enactments providing for copyright for the volumes of reports, or of the reports, do not authorize copyrights of the opinions of the judges.

The averments of the answer respecting the contract by and between the complainants and the proprietors of the law journal at Columbus, which with complainants' consent publish the opinions of the judges, complainants binding themselves to protect them in their assumed exclusive right of publication, are not material. If the reporter had the right to secure copyright in these opinions for the benefit of complainants the complainants had the right to make the arrangement referred to, and it would be not only the right, but the duty of complainants to institute suits for the protection of said publishers in their exclusive license.

But the reporter has no such right. The statute gives him no power, no authority or right whatever, with reference to copyright in even the volumes included in complainants' contract.

Whatever sole and exclusive right to publish such reports the state could confer, was by the express terms of the statute, conferred on the complainants. As held in *Myers v. Callaghan*, the reporter is entitled, in the absence of express legislation to the contrary, to copyright his volumes of reports, to the extent that they consist of the work of his own hand, notwithstanding he may not have a copyright in the opinions of the court. And in this case he might secure copyright in the volumes of reports, not for his own

benefit, but for the benefit of complainants, but the copyrights he has attempted to secure in the opinions of the judges are worthless.

The bill will be dismissed at complainants' costs.

The foregoing case follows the uniform line of decision in America, that no person can have copyright in judicial opinions. Though the point has not been directly passed upon in any modern English case there seems no reason to doubt that the law is now the same there as here. Formerly, the House of Lords used to forbid any report of State Trials, except that authorized by itself; and it was long a custom, no doubt arising as much from etiquette as from law, that the author of a book of reports should obtain the judges' sanction to his work. (*Gurney v. Longman*, 13 Vesey 493. Drone on Copyright 159 *ff*).

The further question, alluded to in the principal case, whether the state which employs the judges may claim copyright in their judgments, has never been decided. This right was formerly exercised in England, but it is to be suspected, that according to the political doctrines of the times it was based rather on royal prerogative—similar to that by which the printing of law-books and bibles was confined to the king's patentees—than on the doctrine of property in the state, as Mr. Drone appears to think.

The authorized Law Reports of our states are often published by an official reporter, who takes the copyright and makes what he can out of the book, subject to a contract to deliver so many copies to the state free of charge, and in the sale of the book not to exceed a certain price per copy. Another method is for the reporter to receive a salary, the publishing of the reports being given out by contract and the copyright held by the secretary of state or other officer in trust for the state. The Ohio statute in the case before us belongs to this class, and the dictum of Judge DRUMMOND, cited by complainant's counsel, is supported by a decision in New York (*Lit-*

tle v. Gould, 2 Blatch. 365), upon a somewhat similar law, in which it was held that by paying a salary the state became entitled to the copyright, as far as the reporter's own work was concerned.

The Constitution of New York declares that all judicial decisions shall be free for publication by any person—a provision which by taking it away seems to recognise a right of property in the state.

On the whole it seems reasonable to conclude that by paying a compensation to her judges the state acquires copyright in their decisions, and by express legislation to that effect may control their publication.

Both in point of law and as a subject of literary inquiry the matter of copyright in legal works is interesting. One reason for this is to be found in the character of legal writing, which offers little scope for beauty of style or originality, and draws its materials from common sources, where it does not levy directly upon the labor of other authors. The cases will repay a review in detail.

In *Butterworth v. Robinson*, 5 Ves. 709, the proprietors of the "Term Reports" applied for an injunction to restrain the sale of an Abridgment of Cases in the Courts of Law. Except in colorably leaving out parts, as the arguments of counsel, the book complained of was a mere copy of cases in the Term and other reports. To give the appearance of a new work the chronological order of cases was changed to an alphabetical one. Lord LOUGHBOROUGH said it was "an extremely illiberal publication," and granted an injunction.

In 1838 arose the question of Leading Cases. (*Saunders v. Smith*, 3 Mylne & Craig 711.) The complainants held the copyright of several reports which they

were pirated by vol. 1, part 2
 th's Leading Cases." It was said
 es had been transferred entire,
 t the work would become a sub-
 for the regular reports. The in-
 was refused, partly on other
 , and the parties were remitted
 tion at law to settle the question
 y. Lord COTTENHAM seemed to
 favor of the defendants, saying
 ether or not there was a piracy
 resent case, the same method had
 employed in other works, in Chitty
 , for instance, where cases taken
 er works were printed at length.
 ue of Smith's Leading Cases, he
 ed, arose not from the report but
 e laborious and learned notes for
 the report served as a starting-
 The same chancellor, in a contest
 two treatises on Passing Bills
 Parliament, declared that piracy
 depend upon the quantity of
 taken but its value. *Bramwell*
omb, 3 Mylne & Craig 737.
veet v. Benning, 16 C. B. (81 E.
 .) 459, the "Jurist," which by
 of lawyers paid for the service,
 d the current decisions of the
 sued the "Monthly Digest," a
 f current decisions. The former
 al published head-notes to the
 s, and the "Monthly Digest"
 these *verbatim*. The majority of
 rt held that there was a piracy,
 y with JERVIS, C. J., who thought
 ch report was in fact double, the
 n full being an expansion of the
 te. If the short report could be
 iated, why not the longer? One
 ot avail himself of another's labors
 y compiling them so as to form a
 he must apply his own brain to
 ng the principle of the decision,
 ess it up in his own language.
 e at bar was a mere mechanical
 ng together of notes made by
 CROWDER, J., concurred with
 sitation, doubting if the object of
 onthly Digest" did not differ from

that of the "Jurist," and whether head-
 notes could be considered short reports.
 MAULE, J., dissented, on the ground
 that the Digest had an object different
 from that of the Jurist, namely, to assist
 those who consulted it in finding cases.
 He further held that a head-note, instead
 of being a report in brief of the case, was
 a statement of the principle decided,
 which was not the same as a report. All
 the judges admitted that the line to be
 drawn in the case between piracy and
 not piracy was a difficult one.

In *Hodges v. Welsh*, 2 Irish Eq. 266,
 Crawford and Dix were the authors of
 a series of reports. The defendant pub-
 lished a book, Reports of Cases on Reg-
 istry of Electors, in which he took from
 Crawford and Dix many cases relating
 to that subject. In some cases the re-
 ports were taken *verbatim*, in others the
 wording was different, one difference
 consisting in the fact that the defendant's
 head-notes were statements of the prin-
 ciple involved, and the report a con-
 densed one, while in Crawford & Dix's re-
 ports the head-notes were what in the
 preceding case C. J. JERVIS called a
 report in brief, and the report was more
 extended. The defendant always gave
 a reference to the report in Crawford &
 Dix from which he borrowed. The court
 held, that there was no difference in the
 rules applicable to a reporter of judicial
 proceedings, and a historian, for instance;
 both must use care, often referring to
 original documents, and the work of one
 might just as well be pirated as that of
 the other. Whatever the law might be
 as to Treatises, the work complained of
 was not a Treatise but a Book of Reports
 on a special subject, and it was an in-
 fringement, because it took, not a few
 cases for illustration, but all the cases on
 registry. Nor were they taken for the
 purpose of annotation, but without note
 or comment. As well might the compiler
 of a book of poems take all his matter
 bodily from another collection. That
 the defendant's book was a useful one,

and made without dishonorable intention, could not influence the question.

In *Banks v. McDivitt*, 13 Blatchf. 163, the plaintiffs published a book of Rules of Practice, with notes of decisions and references. Afterwards the defendant issued a book of Revised Rules, copying the citations in plaintiff's book with additional ones of his own. Most of his notes were identical in substance and arrangement with those of the plaintiffs. SHIPMAN, J., held that there was an infringement, it being evident that the plaintiff's book had been resorted to to save the time and toil which original investigation would cost. The citations followed the same order, and the index was almost a re-print of that in the plaintiff's book.

In *Myers v. Callaghan*, referred to in the text, the defendants published an annotated and condensed edition of Freeman's Illinois Reports. While the work gave evidence of independent labor there were also tokens that Mr. Freeman's volumes had been freely used—words and sentences had been copied without change, sentences had been altered in form only, and there was a similarity in the arrangement of the two works. Judge DRUMMOND decided the second work an infringement, and put the matter as in a nutshell when he said that it was a dangerous thing to sit down with a copyright volume of reports before one and try to make out an independent report, though this could easily be done by the use of original sources of information, the records, briefs of counsel and such like. The judge added that while the paging and arrangement of a volume might not of itself amount to piracy it ought to be taken into account with other matters.

A single case as to Forms: *Alexander v. Mackenzie*, 9 Scotch Ct. of Session, 2d series, 748. Alexander published an Analysis of Certain Real Estate Statutes with Forms, and afterwards a committee of the bar prepared a report with forms subjoined, on the same statutes. It ap-

peared that the statutes gave only vague and general directions as to the forms to be used, so that the preparation of suitable forms was a work of skill and labor. The two sets of forms were alike not only in substance but in the very order of arrangement, though there were some variances seemingly for variance sake. Where, for instance, the complainant's forms had "(insert date)" the defendant's would read "(this—day of—)," etc. The court ruled that there was an infringement, observing that though the materials from which the work is made are *in medio*, yet if they are arranged in new form the work is copyright. And one of the judges pronounced the test to be: Did he do the work fairly and honestly for himself, though he may occasionally have followed in the *vestigia* left by his predecessor?

As this note is confined to cases of copyright in legal writing we offer but one case on the important subject of Abridgments, namely, *Story v. Holcomb*, 4 McLean 306, in which Judge Story's executors restrained an Abridgment of his Commentaries on the Constitution.

Mr. Justice McLEAN laid down the principles that the intent with which the infringing work was written, however blameless, was of little consequence; that a fair abridgment was lawful though injuring the sale of the original book; but that a compilation was not lawful. He said "To copy certain passages from a book omitting others is in no just sense an abridgment of it. It makes the work shorter but it does not abridge it. The judgment is not exercised in conserving the views of the author. To abridge is to preserve the substance, the essence of the work, in language suited to such a purpose. *** A compilation consists of extracts from different authors, an abridgment is a condensation of the views of the author." No better statement of the nature of an abridgment than this need be asked.

The question of the ownership of ar-

in periodicals arose in the Jurist Monthly Digest case before mentioned. On that point the judges were unanimous that when a writer furnished a periodical and was paid therefor the copyright, unless by special agreement, belonged to the proprietor of publication. We have already seen a state reporter paid by salary stands in position to the state. (*Little v. State*, *supra*.)

In two cases on Legal Treatises we have added more as matter of legal bibliography than as establishing any principle. In *Sweet v. Cater*, 11 Wis. 572, equity proceedings were brought against a book on the Sale and Conveyance of Real Property, with Precedents, by William Hughes, as being a copy of Sugden's well known work on Vendors and Purchasers. The report of the case informs us only that the passages copied were so many and so lengthy as to constitute a piracy, and that the parties were remitted to an action at law.

Archbold v. Sweet, 5 Carr. & P. 106. Mr. Archbold, author of the work on Pleading and Practice in Criminal Cases, sold his copyright to a publisher, who issued an edition without Archbold's sanction, edited by another hand, full of errors, but calculated by the appearance of the title-page to pass for Mr. Archbold's own work. Lord TENTERDEN induced the jury upon the errors pointed out and the not very generous verdict

of five pounds was rendered for the plaintiff, Mr. Archbold.

Two rules we think may be deduced from the foregoing review.

1. The work must be independent—we cannot say original—in performance. The author must draw his matter from original sources, must adopt a plan of arrangement for himself, and even in the citation of authorities there must be something beyond the mechanical labor, great as that may be, of verifying the volume and page of references taken from other works.

2. The work must be independent in its object. In other words, reference must be had to the part which works borrowed from bear in the plan of the book. Here lies the difference between a work like Smith's Leading Cases, and a collection of decisions on a special topic or a series of annotated reports. The design and value of the former work consists in the notes, to which the cases borrowed serve but as texts; the object of the latter is to make profit out of the labor of another by putting it into a more accessible form, or adding to its instructiveness.

If the work is thus independent it makes no difference if it supplants the book upon which it is founded—if it is not, the usefulness of the book is no excuse for the infringement.

CHARLES CHAUNCEY SAVAGE.

Supreme Court of Wisconsin.

WHITE v. MILWAUKEE CITY RAILWAY CO.

In an action for personal injuries the court may, in a proper case, at the trial direct the plaintiff to submit to a personal examination by physicians on behalf of the defendant.

On a street railway a separate track was used for the cars going in each direction, and frogs were so placed as to prevent cars, going in the proper direction, from being thrown from the track while going upon or leaving a switch-bridge. A passenger wagon having broken down on the bridge upon one of the tracks, a car approaching thereon was necessarily lifted to the other track, and being then driven

rapidly upon the bridge, was thrown from the track, injuring a passenger. *Held*, that the company was not negligent in not placing frogs so as to prevent a car thus going in the wrong direction upon the track from being thrown off, but that the question whether the speed with which the car was driven upon the bridge was not, under the circumstances, negligent, was for the jury.

To justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of.

APPEAL from County Court, Milwaukee County.

This action was brought by the plaintiff to recover damages for personal injuries alleged to have been received by her through the negligence of the defendant company, its agents and servants, while riding in one of its street cars. The facts of the case are briefly as follows: The defendant operates two tracks of street railway, running north and south on East Water and Reed streets, in the city of Milwaukee. These streets abut each other at the Menominee river, and are connected by a swing-bridge across that river near the Union depot. The tracks are laid upon the bridge. The west track is used exclusively for cars going south, and the east track for those going north. At the time of the injury, the plaintiff was a passenger in one of the cars of the defendant going north on the east track on Reed street, which is the street south of the river. A loaded wagon had broken down on the bridge and obstructed that track. The car in which the plaintiff was riding was safely and properly removed to the west track, and just as it was driven upon the bridge the forward wheels left the track. The jolt of the car caused thereby threw the plaintiff from her seat, and caused the injury complained of, which was a bruise of one of her limbs below the knee. The ends of the rails of the west track on the south abutment next the bridge were constructed with frogs, which seem to be nothing more than a widening of the rails at the ends. There were also frogs on the ends of the rails on the bridge next the north abutment thereof. The same rail was used on the east track, the frogs being upon the ends of the rails on the north abutment, and on the bridge next the south abutment. Thus it will be seen that whichever way the bridge was turned, the location of the frogs was the same. The purpose of these frogs was to overcome the disturbance of the rail by the swaying of the bridge, and to keep the car-wheels on the track when they should strike the bridge or the abutment, although the track might be out of line. It will thus be seen that no precautions were employed in

construction of the tracks with reference to a car running, as this car, north on the west track.

The testimony given on the trial tends to show that the car was being driven rapidly when it jumped the track. In answer to the question, "What caused said car to leave the track and strike the end of the bridge?" the jury answered, "Fast driving, and the presence of a frog on the west track of the bridge." The jury also found the defendant was negligent and the plaintiff was not: that the plaintiff sustained temporary injury to the right leg, which may be permanent, and assessed her damages at \$650. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appealed from the judgment.

C. K. Adams, for respondent.

Rogers & Mann and *E. P. Smith*, for appellant.

MYRON, J.—It is claimed on behalf of the defendant that no sufficient evidence was given upon the trial to support the finding that the defendant was guilty of negligence which caused the injury complained of. We do not think that negligence can be imputed to the defendant by reason of the manner in which it conducted its railway. The track seems to have been laid in the usual proper manner, and the frogs placed in the proper positions to guide the cars upon the track when they passed the bridge. In view of the direction in which the cars were moved on the respective tracks, it would be unreasonable to require the defendant to construct its tracks to guard against a contingency such as occurred in the present case. Moreover, it does not appear that the company, in this respect, has violated any of the requirements of its charter, or any order or direction of the authorities of the city of Milwaukee. It is obvious, however, that a car passing north on the west track from the south abutment to the bridge (as was the question) would be much more liable to leave the track than a car going in the opposite direction on the same track. This fact would render it the duty of the servants of the defendant in charge of the car, to exercise more caution to keep the car on the track, than would be required were it moving in the opposite direction.

Manifestly the most effectual precaution that could be used to keep the car on the track, or, at least, to prevent injury to passengers if it left the track, would be to drive slowly from the abut-

ment of the bridge. The testimony in the case, although conflicting, tends to show that this car was driven rapidly at that point. Whether moving the car at such a rate of speed was or was not negligence is peculiarly a question of fact for the jury. The finding in that behalf is supported by the evidence. We conclude, therefore, that there was no error in submitting the question of defendant's negligence to the jury, and the verdict on that question cannot be disturbed.

The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effect of the injuries; that her limb was not then in a normal condition; and that the effect of such injuries would or might be permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial counsel for the defendant made the following request, and the following proceedings were thereupon had; "Defendant's Counsel.—We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to the courtroom, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses. Court.—I do not see anything improper in the request, but I do not think I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will; I therefore refuse the application. (Defendant excepts.) Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician, who, as her attorney is informed and believes, has left the city since he has been on the witness stand.' "

It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequence of the injury. It would, or might have been more satisfactory and conclusive evidence on that subject than the statements of the plaintiff, or the opinions of the medical

esses. The application for her examination contained in it a very reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination the ends of justice imperatively demanded that she submit to it. Such examinations are frequently ordered by courts in cases of force for impotency, and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so as we are advised.

In *Walsh v. Sayre*, 52 How. Pr. 334, the power of the court in a proper case to order a personal examination is asserted, and it is said that it rests upon the same principle as does the power to compel the discovery of books, papers and documents, the difference being that in a case like this the principle extends to things or substances as well. *Schræder v. Chicago R. I. & P. Ry. Co.*, 47 Iowa is to the same effect. The opinion of BECK, J., in that case, and of JONES, J., in *Walsh v. Sayre*, *supra*, contain very able and satisfactory discussions of this question. It is said by the learned counsel for the plaintiff that it rests in the sound discretion of the court to order or refuse an examination. Perhaps it does. But no discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it. It has already been stated that to the question, "What injury the plaintiff sustain, if any, by such accident?" the jury answered: "Temporary injury to the right leg, which may prove permanent." This is but little, if anything, more than a finding that the injury may possibly be permanent. A mere possible continuance of disability by reason of an injury is not a proper element of damages. To justify the jury in assessing damages for future permanent disability, it must appear by the proofs that continued permanent disability is reasonably certain to result from the injury complained of. It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This also is error. Other errors were assigned and argued by counsel, but as the above views are decisive of the case it is unnecessary to consider them. The judgment of the county court is reversed, and the cause will be remanded for a new trial.

Supreme Court of Nebraska.

SIOUX CITY & PACIFIC RAILROAD COMPANY v. FINLAYSON.

It is not error for the court, during the progress of a trial, to refuse to order the plaintiff, who sues for injuries to his person, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury.

THIS was an action for damages resulting from a personal injury caused by the explosion of an engine belonging to defendants. A number of questions were raised in the case, but only that portion of the opinion is given which relates to the point referred to in the syllabus.

L. W. Osborn and Joy, Wright & Hudson, for plaintiff.

George W. Doane and Ballard & Walton, for defendant.

The opinion of the court was delivered by

REESE, J. (after deciding other questions raised by the case).—The record shows that after the defendant in error had introduced all his testimony on the trial, and had rested his case, the “defendant (plaintiff in error) moved the court to direct the plaintiff to allow the physicians, called on the part of the defence, to make an examination of his person with reference to his alleged injuries for which he now seeks to recover. The court ruled that it had no power to make such an order; to which ruling defendant excepts.” Error is assigned in this court based upon this record. If such examination was proper to be made, and if the defendant in error, upon application had refused to allow it to be done, we are inclined to believe the court had the *power* to make and enforce such an order. It is fundamental that, if a decision or ruling of a court is correct, the fact that the reason assigned therefor by the court, when making it, is not sufficient to sustain the order; the fact of such deficient reason being given will not vitiate the ruling or order. The question now before us is, did the court err in its refusal to make the order requested? We think not. It is not the province of courts to make useless and unnecessary orders simply because they are so requested. There was no showing made to the court that permission to make the examination had been refused by defend-

in error, nor that any such permission had been requested. There is no showing of any kind that such examination was necessary in order to aid defendant in error in making its defence; indeed there was no intimation made that any good could possibly result or be derived from such an examination. The request was made in the midst of the trial. The court was asked to stop the trial and send out the plaintiff in the suit for examination. Again, this request hardly possessed all the elements of fairness. The court was asked to virtually place the defendant in error in the hands of the defence. It was not sought to have the examination made by interested and unbiased surgeons whom the parties might select, but by the "physicians called upon the part of the defence." Again, the record shows that, when the witnesses on the part of the defence were placed upon the stand to testify to the question of the alleged injury, the defendant in error was asked to "step forward and allow the witness to examine him;" and he did.

The record further shows that the defendant in error was "asked to remove his coat and vest, which he does, and the witness examined the back, sides, and other portions of the body of the plaintiff, as to his breathing; also the condition of his eyes, the muscles of the leg, the condition of the tongue and of the pulse." From this it would seem that even if the court had erred by its refusal to grant the order, that error was cured by the examination made by the plaintiff in error. The only case cited by plaintiff in support of his position is *Schræder v. C., R. I. & P. R.*, 47 Iowa 375. But there is a wide distinction between that case and this. In that case the request was made after the jury was impanelled, but before any of the testimony was heard. The request was in writing, and requested the examination to be made by "proper number of physicians to be selected, in equal numbers from plaintiff and defendant, and it was proposed by defendant that his own medical officer should not be one of the number; * * * In support of this application the affidavit of a surgeon and physician in the employment of defendant was filed, stating that he had professionally attended plaintiff immediately after he was injured, and had made personal observation of plaintiff's condition, and had heard his testimony at the former trial, and it was his belief, based upon these means of knowledge, that his injuries were not of the character claimed by him, and that the truth of the matter

could be ascertained by a proper personal examination of plaintiff." It also appears in that case that an effort was made to procure an examination of plaintiff in the presence of the jury, as was done in this case, but the plaintiff refused to submit to it, and the court would not order it; and that, too, after the plaintiff had testified that his back and internal organs were affected by the injury, and "that one of his legs was disabled to an extent that deprived him of its full use, and that he thought it appeared to be smaller and somewhat shrunken." Our attention has been called to no other case upon this subject, and we know of no other holding as the Iowa case. As to the soundness of the position taken by that court we have nothing to say. The question is not before us. It is enough to say that under the authority of that case it cannot be made to appear that the ruling of the court in this case was erroneous, or that it abused its discretion in refusing to make the order sought.

The next question presented by plaintiff in error is that the verdict of the jury is not sustained by sufficient evidence. With the exception hereafter noticed, we cannot agree with the counsel for plaintiff in error. We have already in some degree discussed the evidence and facts of the case, and the length of the record must prevent any further discussion thereof. We have carefully examined the record, and conclude the evidence will sustain a verdict for defendant in error. The last matter presented for consideration is that the verdict is excessive. To this proposition we assent. The testimony shows that at the time he received the injury the defendant in error was about 25 years of age. While the testimony of the physicians leave it in doubt as to his final and complete recovery, it appears that at the time of the trial he had so far recovered from his injury as to be engaged in business, and to be able to devote most of his time thereto. The injury is defined and described by the physicians as concussion of the spinal cord, by which a diseased or abnormal condition of the nervous system is produced, affecting his general health to some extent, and depriving him of the ability to engage in active physical labor, and perhaps rendering him unfit to engage in his business as railroad engineer. He has retained his mental faculties to their full extent. At times he is free from pain; at others he has a soreness and pain in his back. There was no laceration of any part of his body, no fracture of any bones. There is supposed to be no injury to the bones of his

al column. The physical or visible evidences have disappeared, some of the physicians give it as their opinion that there will natly be a substantial but perhaps not a complete recovery. elieving that the verdict is excessive, the judgment and decision is court is that the judgment of the District Court be set aside a new trial granted, unless the defendant in error enter a ittitur of the sum of \$3000 within 30 days from this date. If remittitur is filed, the judgment, to the extent of \$6260, will affirmed.

Judgment accordingly.

one who considers the question, upon principle or authority, it seems ising that it should ever have been ted that, as held in the principal case *White v. Milwaukee City Ry. Co.*, in ction for personal injuries, the court in a proper case, direct the plain- o submit to a personal examination ysicians on behalf of the defendant. maxim, "believe half what you see a twentieth part of what you hear," es a comparison not altogether un- between the value of evidence ad- ed primarily to the senses and parol ony as ordinarily introduced in our ts of justice. "In judicial proceed- the judge or jury can seldom act ly upon evidence of this description [dressed to the senses], though, when nancy is pleaded, a jury of matrons mpowered to decide the issue upon mination of the person of the prisoner; n a vast number of instances, espe- y where the fact in dispute is sought proved by circumstantial evidence, verdict will be found to rest mate- y upon matters submitted to the oc- inspection of the jury:" 1 Taylor v. (7th London ed.) § 554; *Bayn- Case*, 14 How. St. Pr. 630, 631, ; 1 Hale 368; 2 Id. 413; *Reg. v. cherly*, 8 C. & P. 262. In the last decided in 1838, the practice in such s is described. The matrons in this having desired the assistance of a geon, it was decided that they should rn into the court room: the surgeon

was directed to retire and examine the prisoner, and upon his return was sworn and examined as an ordinary witness in open court. See, also, 1 Bish. Crim. Proc. § 1323; *State v. Arden*, 1 Bay 487.

The practice in suits to declare a marriage null on the ground of impotence will be found in 2 Bish. Crim. Proc. § 590, from which it appears that it is settled law, both in England and the United States, to order an inspection of the person in such cases. See *Devanbagh v. Devanbagh*, 5 Paige 554; *Le Barron v. Le Barron*, 35 Vt. 365; *Anon.*, 35 Ala. 226.

Another case in which inspection of the person was the established practice was upon appeals of mayhem. "When upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons:" 3 Bl. Com. 332; 2 Rolle's Abr. 578. Although appeals of mayhem are obsolete, the ancient practice in such cases may well be cited to show the general spirit and methods of the common law where an examination of the person is necessary to advance the interests of justice.

Cases holding that a prisoner accused of crime cannot be compelled to submit to an examination of his or her person when the results of such examination might furnish evidence against himself or

herself, do not militate against the position of the principal case, on account of the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself. See *People v. McCoy*, 45 How. Pr. 216.

The well-considered cases of *Walsh v. Sayre*, 52 How. Pr. 334; and *Schrader v. The Chicago, R. I. & P. Rd. Co.*, 47 Iowa 373, are the only cases with which we are acquainted, besides the principal cases, bearing directly upon the point in question; and if any authority were necessary, these would seem to be conclusive upon the question. We do not believe the doctrine of these cases can ever be successfully controverted, founded as they are upon the soundest reason and being necessary to the interests of justice.

MARSHALL D. EWELL.

Chicago.

Since the foregoing note was written the Supreme Court of Nebraska has again passed upon the question involved in the principal case of *Sioux City & P. R.R. Co. v. Finlayson*, and has adhered to that decision: *Stuart v. Havens*, 22 N. W. Rep. 419. The case of *Hatfield v.*

St. Paul & D. Rd. Co., 22 Id. 176, recently decided by the Supreme Court of Minnesota, may also be read with profit. In the latter case, which was an action for personal injuries, it was held that the court has power in a proper case and under proper circumstances to require the plaintiff to perform a physical act in the presence of the jury, that will show the nature and extent of his injuries, but that the propriety of doing so in a given case rests largely in the discretion of the trial court. In this case the uncontradicted evidence of a number of witnesses showed that since receiving the injury complained of the plaintiff was lame and "limped" when she walked; and it was held that the court committed no error in refusing to require her to walk across the court room in the presence of the jury. In delivering the opinion of the court, MITCHELL, J., referred to the case of *Schrader v. Chicago, &c., R. R. Co.*, and conceded the correctness of the principle contended for in the above note. Upon the whole no reason appears why we should change the opinion already above stated.

M. D. E.

Supreme Court of Vermont.

WELLS v. TUCKER.

Where a sale is made of land, separate portions of which are subject to separate mortgages, and the vendee as part of the price assumes the payment of said mortgages, and subsequently the vendor is compelled to pay one of them, the vendee cannot maintain a bill against the vendor to redeem the land from such mortgage without also paying the other mortgage.

BILL IN EQUITY. Defendant Tucker, owning a farm on each undivided half of which rested separate mortgages given by him, conveyed the same to defendant Wells, the deed referring to said mortgages, describing the notes thereby secured, and stating that "said Wells assumed the payment of said notes agreeably to their tenor, and to save the said Tucker harmless and indemnified therefrom;" and the amount due on said mortgage was reckoned as

of the purchase-money. Wells accepted said deed, and went into possession under it; and on May 1st 1881, conveyed his equity of redemption to his mother, who now, with his wife who claimed the state of homestead, filed this bill to redeem one of said mortgages as against Tucker who had been compelled to pay it, without redeeming the other. The master found that the trade for the farm was all one trade," and the assumption of the mortgages "all one assumption."

P. Lamson and S. C. Shurtleff, for complainants.

A. & Geo. W. Wing, for defendant Tucker.

The opinion of the court was delivered by
 WELLS, J.—By accepting the deed from Tucker and going into possession under it, Wells assumed and agreed to pay both mortgages as a part of the purchase-money, and to save Tucker harmless and indemnified therefrom. As between Tucker and Wells, Wells became primarily liable for the payment of said mortgages, and Tucker became his surety therefor, and the land became the primary fund out of which payment was to be made. It is not Wells failing to pay as he agreed, that Tucker could pay and be subrogated in equity to the mortgage security; but this is not the only effect of Wells's agreement. By it the two mortgages were consolidated and made one as to Wells and all persons claiming under him, and the burden of each was annexed to, and made to rest upon the whole land; and this, not because the lien of each was actually extended over the whole land, but because of the nature of the act itself, which equity takes cognisance of, and will enforce for the benefit of Tucker as against Wells and all persons standing in his

In the case of *Welch v. Beers*, 8 Allen 151, is full authority for this view, and was thus: Prescott held a mortgage for \$500 on a certain tract of land, and had taken possession to foreclose. After making of the mortgage, the mortgagor conveyed a part of the tract with an agreement recited in the deed, that the grantee should and was to pay the whole of the mortgage as a part of the purchase-money. Afterwards the mortgagor conveyed the remainder of the tract to the plaintiff in fee, not covenanted to pay the mortgage, but with an express understanding that it was to be paid in full by the prior purchaser. Prescott subse-

quently took a new mortgage of the first part for \$1200, with full knowledge of said agreement, and the value of that part was more than enough to pay the \$500 mortgage. *Held*, that the plaintiff's part of the land was exempt from said last-mentioned mortgage, not because his deed of warranty left the whole burden of it to rest upon the other part, but because said agreement expressly annexed it to such part before the plaintiff purchased.

This is very analogous to the rule in equity, that when land subject to mortgage is sold by the mortgagor in separate parcels to different purchasers, without an assumption by them of any part of the mortgage debt, and the deeds are duly recorded, or actual notice is had of the state of the title and the subsisting equities, the purchasers, as between themselves, are charged, and must contribute in the inverse order of the time of their purchases. This rule rests upon the ground, that when a mortgagor sells a part of the mortgaged premises without reference to the incumbrance, it is right, as between him and the purchaser, that the part still held by him should be first applied to the payment of the debt, and so equity charges it with such payment. But this is not, as was said in *Welch v. Beers*, because a deed of warranty of part, of itself, directly creates a lien on the remainder for the whole amount of the mortgage, but because equity recognises the mortgagor's contract as binding on subsequent purchasers who take with notice thereof.

So here, it is right as between Tucker and Wells, that Wells should pay both mortgages before holding any part of the farm free from either; and a court of equity would not aid him, as against Tucker, to redeem one of them only, and thus enable him to hold an undivided half of the farm free from both, for this would be contrary to the spirit of his agreement, and he who seeks equity must do equity. And the complainants have no better right than Wells himself had, for they sit in his seat.

Decree affirmed and cause remanded.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹SUPREME COURT OF ILLINOIS.²COURT OF ERRORS AND APPEALS OF MARYLAND.³SUPREME JUDICIAL COURT OF MASSACHUSETTS.⁴

ADMIRALTY.

*Practice—Amendment of Libel on Appeal to the Circuit Court—Col-
 Evidence—Findings of Board of Local Inspectors.*—Where
 in claims for damage were rejected by the District Court because
 included in the original libel, *held*, that the Circuit Court on appeal
 in its discretion permit libellants to file a supplemental and
 amended libel setting up such claims: *The North Carolina*, 15 Pet. 40,
quished: *The Charles Morgan*, S. C. U. S., Oct. Term 1884.
 The findings of the board of local inspectors, and the documents con-
 d therewith, in a proceeding instituted under Rev. Stat., sect. 4450,
 an investigation of the facts connected with a collision, so far as
 had a bearing on the conduct of the licensed officers on board the
 are inadmissible in a collision suit in admiralty when offered by
 defendants as tending to affect the evidence offered by the libellants
 now that their boat was in her proper position and had proper watches
 lights set at the time of the collision: *Id.*

AGENT. See *Bank*; *Common Carrier*.

*Contract—Association of Railroad Companies—Partnership—Con-
 by one Company, whether Binding on all—Rebate of Freight—
 nance—Ratification.*—Where a combination or association of three
 or different railroad companies is formed for the transportation of
 and the transaction of the business of a common carrier, which
 conducted by the general managers of each of the component com-
 es, as in the case of a partnership, so long as one of the companies
 within the general scope of its powers in making contracts or per-
 forming other acts on behalf of the association, the association itself
 be bound, although the particular company acting for it has ex-
 ercised its authority, as tested by its laws or articles of association: *The
 and Pacific Despatch v. Cecil*, 112 Ill.

contract of a railway company or association of such companies,
 by its usual agents, with a shipper, to ship and carry a large
 quantity of grain at a reduced rate, which is five cents on the hundred
 pounds less than the customary rates, but that the same should be billed
 at the regular rates then current and the freight paid at the latter rates,
 the difference in the two rates to be forthwith paid back to the shipper
 paid and binding on the company or companies making the same: *Id.*

Prepared expressly for the American Law Register, from the original opinions
 during Oct. Term 1884. The cases will probably appear in 115 U. S. Rep.

From Hon. N. L. Freeman, Reporter; to appear in 112 Ill. Rep.

From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

From John Lathrop, Esq., Reporter; to appear in 138 Mass. Rep.

In a suit against an association of railway companies on a contract made by a local agent of one of the companies, the defendant offered in evidence the articles of agreement between the several companies composing the association, for the purpose of showing a want of power in the local agents to make the contract: *Held*, that they were not admissible in evidence against the plaintiff, as the public could not be bound by them, or the rules and regulations they might contain: *Id*.

To prove the ratification of a special contract made by a station agent of a railway company in this state, which company, with others, constituted an association in the nature of a partnership, it appearing that the general manager of the same company approved such contract, the plaintiff offered in evidence three telegrams between the general manager of the railway company and the general manager of the association, showing that though the first had exceeded his orders, the latter would protect him: *Held*, that the telegrams were competent evidence on that question: *Id*.

Where the general manager of an association of railway companies has notice of the existence and terms of a special contract for transporting grain at a reduced rate, made by an agent of one of the associated companies, and afterward furnishes cars and transports the grain, this is evidence from which a ratification of the special contract may be found: *Id*.

ATTACHMENT. See *Husband and Wife*.

ATTORNEY.

Liability for Costs.—An attorney at law, who places his name under the words "From the office of," on the back of a writ in favor of a resident of another state, is liable, as endorser, for costs: *Morrill v. Lamson*, 138 Mass.

If an attorney at law endorses a writ in favor of a resident of another state, he cannot set up in defence to a *scire facias* to enforce a judgment for costs awarded against such party, that, in so doing, he violated a rule of the court, prohibiting an attorney from becoming bail or surety in any civil suit or proceeding in which he is employed as such attorney: *Id*.

BANK.

Certificate of Deposit—Principal and Agent—Notice—Subrogation.—S. S. deposited a sum of money in bank and received a certificate of deposit, setting forth the deposit of the money by him, and stating that the same was payable to the order of himself, or of E. S., on the return of the certificate. Before the money was withdrawn, S. S. died. After his death, E. S., who was his wife, presented the certificate, and drew from the bank the amount of the deposit: *Held*, 1st. That the certificate of deposit did not authorize the payment of the money to E. S. after the death of S. S. 2d. That notice to the paying-teller of the bank, of the death of S. S., received prior to the payment by him to E. S. of the amount of the deposit, was notice to the bank. 3d. That if he in making the payment, after such notice, mistook the law, the bank whose agent he was, must suffer the consequences: *Second Nat. Bank v. Wrightson*, 63 Md.

the bank filed a bill in equity, to enjoin the prosecution of an action at law against it for the money deposited by S. S., brought by his executor; and to have the certificate reformed, as not having been drawn in conformity with the agreement of the parties. The evidence failed to establish a case for reformation of the certificate, but it was developed by the proof, that a part of the money drawn by E. S., went directly to the payment of the debts and funeral expenses of S. S. On appeal it was *held*: That the court below committed no error in retaining the writ, and under the prayer for general relief, allowing the bank a credit for the amount of the money drawn by E. S., that went directly to pay the debts and funeral charges of S. S., and for which the executor had obtained a credit in his administration account: *Id.*

BILLS AND NOTES. See *Evidence*.

CHARITY

Charitable Institution—Not liable for wrongful Acts of Employees.—A house of refuge, being a corporation instituted for charitable purposes, cannot be made liable in an action for damages, for an assault committed by one of its officers on an inmate of the institution: *Perry v. House of Refuge*, 63 Md. Damages cannot be recovered from a fund held in trust for charitable purposes; they must be recovered from the wrongdoer: *Id.*

COMMON CARRIER. See *Agent*.

Presumption of Negligence—Burden of Proof—Injury to Passenger entering Train.—The carrier is bound to exercise the greatest care and diligence in everything that concerns the safety of passengers: If one is injured by the breaking down or upsetting of the vehicle in the transportation, or by the colliding of one train with another, or the train running off the track from some defect in the roadbed, in such, and in other like cases, the evidentiary facts in themselves create a presumption of negligence on the part of the carrier: *Baltimore & Annapolis Railroad Co. v. Mahone*, 63 Md.

Under such circumstances, the carrier must show that the accident happened in spite of the exercise by him and his servants, of the greatest degree of care and diligence practicable under the circumstances: *Id.* Although the burden of proof is on the plaintiff to show that the injury was occasioned by the negligence of the defendants, yet he discharges this burden and makes out a *prima facie* case by showing that the accident happened through the failure of some of the means used by the carrier in making the transit: *Id.*

To create the relation of carrier and passenger, it is not necessary that the latter should actually have entered the train. If he had purchased a ticket and was crossing the track by and under the direction of the ticket agent, for the purpose of taking the train, he is to be considered as a passenger, and as such entitled to all the rights and protection of one: *Id.*

Railroad—Conditions of Ticket—Statements of Gatekeeper—Conspicuous Trip.—Where an excursion ticket is sold by a railroad company to a passenger at a reduced rate, and upon special conditions, the terms of which are printed on the ticket; and one of the conditions is that it

shall be used "for a continuous trip only," and "is not good to stop off,"—the purchaser who accepts and uses it, is bound to take a train which will carry him continuously through, from one station to the other, both in going and returning, and not to stop off at an intermediate station while going either way: *Johnson v. Phila., Wilm. & Balto. Railroad Co.*, 63 Md.

If the passenger on his return knowingly takes a train which does not go as far as the station at which he purchased his ticket, and with the intention of stopping off at an intermediate station, the officers of the company are justified in refusing to accept the return coupon of the ticket for his fare, and in putting him off the train on his refusal to pay the regular fare demanded, or to produce a proper ticket to the station he intended to stop at: *Id.*

And it is no excuse for his refusal, that he went to one of the gatekeepers at the station where he took the train, who examined his ticket and negligently assigned him to the wrong train: *Id.*

In the absence of proof that the gatekeeper had authority to vary the terms of contracts for the company, the passenger cannot get rid of the conditions of his contract by showing that he relied on the actual or implied direction to take the train, given either through the belief of the gatekeeper that the ticket was good for the train, or through his negligence, ignorance or mistake: *Id.*

CONFLICT OF LAWS. See *Corporation; Husband and Wife.*

CORPORATION. See *Removal of Causes.*

Individual Liability of Officers for Wrongs done by their order—Evidence—Retention of Servant.—If an officer of a private corporation performs an illegal act, or such act is performed by his orders where he has authority to control the servant doing the act, and such illegal act results in injury to another, the officer directing the act will be individually liable in damages to the injured person: nor will he be exonerated from such liability from the fact that the corporation may also be liable: *Peck v. Cooper*, 112 Ill.

Where the president of an omnibus line, an incorporated company, promulgated an order to its drivers to exclude all colored persons from riding in their conveyances, and in pursuance of such order a driver ejected the plaintiff, who was a colored person, from his omnibus, thereby inflicting a personal injury, it was held, that the president individually was liable to the plaintiff for the damages received: *Id.*

The retaining of a servant of a company after knowledge is brought home to the officer or agent of the company of his misconduct resulting in a personal injury to another, or failing to discharge him for negligence, &c., has been held admissible in evidence, when the fact was known to the officer or agent of the company having power to dismiss the negligent servant, as characterizing the *animus* of those controlling the company, and as an ingredient in the measure of damages: *Id.*

Liability of Stockholders to Creditors—Bill to enforce—Parties—Foreign Receiver.—A foreign insolvent corporation owing debts, if still in existence, can be compelled, by mandamus or bill in equity, to collect its unpaid subscriptions wherever the stockholders may reside; and if it has ceased to exist, a receiver should be appointed, and the courts of

other states, as a matter of comity, would recognise the right of the receiver, the same as they would the corporation itself if still in existence, to prosecute actions at law for the recovery of unpaid subscriptions: *Patterson v. Lynde*, 112 Ill.

Unpaid subscriptions are a trust fund for the payment of the debts of the corporation, which is the trustee. When, therefore, the corporation has ceased to exist, then, upon a principle that a trust shall not fail, a court of equity will take jurisdiction and wind up its affairs: *Id.*

To enforce the liability of the stockholder for his unpaid stock, it is dispensable that the corporation (or, if it has ceased to exist, all its stockholders and creditors), should be before the court so as to be bound by its orders and decrees, and so that complete justice may be meted out to all, and all conflicting rights and equities finally adjusted: *Id.*

A bill was filed in the circuit court by creditors of an insolvent private corporation of the state of Oregon, against defendants, as stockholders. The complainants alleged the recovery of a judgment at law in Oregon against the company, and its insolvency, and their inability to obtain a judgment at law in this state, and also alleged that the defendants owed large sums on their subscriptions to the capital stock of the company, and sought a decree against them for the same, to satisfy complainant's demands. The court below sustained a demurrer to the bill: *Id.*, that the demurrer was properly sustained, for the reason of its being impossible to acquire jurisdiction of the corporation, and the non-resident stockholders having no property here: *Id.*

While this court has held that a foreign receiver should not be permitted, as against the claims of creditors resident in another state, to move from such state the assets of the debtor, yet when resident creditors have no fixed legal claim to the property, he may be allowed, as a matter of comity, to remove the same. This is consistent with the right of a receiver appointed in a foreign state, when creditors have not liens thereon, to sue in our courts for unpaid subscriptions, and collect the same, subject to the order of the court appointing him: *Id.*

Liability for issuing Certificate of Stock—Forged Transfer.—A corporation by issuing stock, declares to the world by its certificate that the person in whose name it stands is the holder of the number of shares which the certificate states him to be; and that it is issued with the intention that it shall be so used and acted upon; and the company is thereby liable to any one who has accepted the same and acted thereon to his injury: *Metropolitan Savings Bank v. Mayor and City Council of Baltimore*, 63 Md.

But it is only to the extent that loss has actually been incurred through the misrepresentation made by the certificate that it will be made good: *Id.*

CRIMINAL LAW.

Evidence—Identification by Voice alone.—At the trial of a criminal case, the testimony of a witness, identifying the defendant by his voice, whom the witness has heard speak only once before the occasion of the commission of the offence charged, which was after dark, is competent, and may be considered by the jury in connection with other evidence of identity: *Commonwealth v. Hayes*, 138 Mass.

Possession of Stolen Property—Presumption.—If pigeons are stolen from the house in which they were confined by the owner, and are found in the possession of a person who bought them of another about two weeks after the larceny, the latter may be convicted of such larceny if his possession of the pigeons is not satisfactorily explained: *Commonwealth v. Deegan*, 138 Mass.

DAMAGES.

Evidence—Pecuniary Circumstances of Defendant.—On the trial of an action of trespass for an assault and battery, the plaintiff may give in evidence the pecuniary circumstances of the defendant to enhance his damages, and in such case the defendant may give counter evidence on the subject; but unless such evidence is given by the plaintiff the defendant has no right to introduce proof on that subject, even in mitigation of damages: *Mullin v. Spangenberg*, 112 Ill.

DEED.

Grantor's Control over it until it takes effect.—A mother was induced by her son, while she was in a feeble state of mind, to execute a deed to him for her land, including her homestead, under the assurance and belief that it would not take effect until recorded, and the grantee agreed not to procure the same to be recorded during the life of the grantor: *Hell*, the deed would not take effect as to the grantee, and the grantor might destroy the same at pleasure: *Sands v. Sands*, 112 Ill.

DESCENT.

Inheritance of Illegitimate Children—Conflict of Laws.—At common law a bastard has no right of inheritance, being regarded as *filius nullius*; and this rule is in force in this state. A bastard in this state cannot inherit from its father, unless he shall have married the mother and acknowledged the child as his own, but the child may, under the statute, inherit from its mother: *Stoltz v. Doering*, 112 Ill.

The descent and heirship of real estate are exclusively governed by the laws of the country within which the property is actually situated. No person can take, except those who are recognised as legitimate heirs by the laws of that country, and they take in the proportions and the order which those laws prescribe. Although a bastard may be entitled in Germany, where born, to inherit from his father, he cannot inherit real estate from him situate in this state: *Id.*

DEVISE. See *Will*.

EJECTMENT. See *United States*.

EQUITY.

Mistake of Law—When relieved against.—A favorite son, taking advantage of his mother's affection, induced her to make a conveyance of all her estate to him, upon the assurance of the son that the deed was in the nature of a will, and would not take effect in her lifetime. The mother was, at the time, of the age of seventy-three years, and greatly weakened in the body and mind from disease and sickness, so as to be incapable of transacting business, and the proof showed the deed was not intended by her to have effect before her death, but was handed to the

be placed with her papers, and upon her recovery she destroyed the deed. *Held*, that the trial court erred in decreeing that the mother execute another deed in place of the one she had destroyed, and in discharging her cross-bill to have the conveyance made set aside: *Sands v. ...*, 112 Ill.

ENCE. See *Corporation*; *Criminal Law*; *Damages*; *Witness*.

General Character of Witness—Presumption of Payment of Due Bill by Maker.—A party cannot call and examine witnesses to support the general character of another witness, or himself, as a witness, for truth and veracity, until the character of the witness thus sought to be supported has been directly assailed. Mere contradictions or differences by witnesses do not justify the application of the rule that evidence may be given favorable to a witness' character for truth. It is only when witnesses are called who testify that his general character for truth is bad, that witnesses may be introduced in support of his general character: *Tedens v. Schumers*, 112 Ill.

The fact that a due bill is found in the hands of the maker is *prima facie* evidence of its payment, and the payee suing on the same is required to overcome the presumption by a preponderance of evidence, if he can recover. In a suit to recover an alleged indebtedness, the plaintiff must prove the defendant owes him, by a preponderance of evidence: *Id.*

And if the plaintiff shows, by a preponderance of evidence, that the defendant owes him on a due bill, notwithstanding its surrender to the defendant, then the defendant must overcome that evidence by a preponderance to defeat a recovery: *Id.*

It is error to refuse an instruction, in a suit to recover a debt which is denied by the pleading, that the plaintiff must make and establish his case by a preponderance of the evidence, and unless he has done so the jury should find for the defendant: *Id.*

HUSBAND AND WIFE. See *Witness*.

Marriage—What constitutes.—In the absence of any statutory prohibition, a marriage at common law may be had *per verba futuro cum copula*; but the *copula* must be in fulfilment of the agreement to marry, or in consummation of such a contract. The fact that sexual intercourse occurs after the agreement to marry at some future day, is of itself sufficient to establish the marriage relation. To be available the parties, at the time of the *copula*, must then have accepted of each other as husband and wife: *Stoltz v. Doering*, 112 Ill.

Attachment—Property of Wife—Judgment against Railroad for Injury to Wife.—A judgment obtained by a husband and wife against a railway company, for injuries sustained by the wife, cannot be attached for a debt due by the husband, being exempted from execution in virtue of art. 43, of art. 3, of the Constitution, which provides that "the property of the wife shall be protected from the debts of the husband": *... v. Woolton*, 63 Md.

INSURANCE.

Leading—Declaration—Assignable Interest—Assignee—Right to Complete Premiums—Payment one-half in Cash and one-half in ...

Note—Ninety-Days Clause—Interest.—If a declaration on a policy of life insurance refers to the policy without annexing a copy, and does not set up any contract inconsistent with the policy, an objection, taken when the policy is offered in evidence, that there is a variance between the policy and the declaration, cannot be maintained: *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass.

If a declaration on a policy of life insurance, which refers to the policy, is not demurred to, it is no ground of exception to the admission of the policy in evidence, that the declaration construed in connection with the policy is ambiguous: *Id.*

A declaration on a policy of life insurance need not allege facts which defeat a part of the plaintiff's claim under special provisions of the policy: *Id.*

A policy of life insurance on the life of A. was payable on his death to his wife and children, and their assigns; and, if he survived a certain day, was payable to him: *Held*, that he had an assignable interest in the policy: *Id.*

A policy of life insurance provided that, if assigned, written notice should be given to the insurer. An assignment was made, notice was given, and the insurer acknowledged notice thereof: *Held*, that this did not amount to a promise, on the part of the insurer, to pay the assignee, and that he could not maintain an action on the policy in his own name: *Id.*

A policy of insurance, in consideration of the payment of an annual premium, insured the life of A. in a certain sum, "or after the due payment of premium for two or more years, if default shall be made in the payment of any subsequent premium, for as many tenth parts of the original sum insured as there shall have been complete annual premiums paid." In the margin of the policy were words and figures denoting that one-half the annual premium was payable in cash, and one-half by note: *Held*, that these words and figures formed part of the policy, and that, if annual premiums were paid one-half in cash and one-half by note, "complete annual premiums" were paid: *Id.*

In an action at law on a policy of life insurance payable at a day named in the policy, evidence is inadmissible, in defence, to show that a different day should have been written: *Id.*

In an action on a policy of life insurance, payable if the person whose life is insured survives a certain day, the plaintiff can recover interest only from the date of the writ, unless in his declaration he alleges a demand before that time: *Id.*

If a policy of life insurance is payable ninety days after due notice and satisfactory evidence of the death of the person whose life is insured, or, if he survives a certain day, is then payable to him, the ninety-days clause has no application to the latter contingency, and interest is not payable except as damages for wrongfully withholding the money: *Id.*

Mutual Benevolent Association—Death Assessment—Forfeiture of Membership—Notice—Sickness as an Excuse for Default—Waiver.—Y. was a member of a Mutual Benevolent Association, whose object was to provide and maintain a fund for the benefit of the widows and orphans of deceased members. By one of its articles it was provided that upon the death of a member of the association, the secretary should notify each

member, and thereupon each member should "within thirty days from the date of said notice pay to the secretary the sum of one dollar and ten cents, and in case he neglect or refuse to pay the same, his name shall be erased from the roll of members, and he shall forfeit all claims on the association; nevertheless any member may be reinstated by paying such excuse himself or through his representative, for failing to pay his assessment as may be satisfactory to the board of directors." It is further provided that "a notice directed and sent to the post-office address or to the residence of a member as recorded in the books of the secretary, shall be deemed a legal notice." On the 29th of August 1882, notice of that date of assessments for and in respect of the death of Y. to members, was directed and sent to the post-office address of Y., requiring him to pay said assessments within thirty days from the date of such notice. No payment or tender of the assessment was made, and he died two days after the expiration of the thirty days from the date of the notice. He was taken sick on the 13th of September 1882, and was for the most of the time between that date and the time of his death, in a state of delirium, and entirely incapable of attending to business. In an action against the association, brought by the widow of Y., it was *held*: 1st. That the obligation to pay the death assessment was personal to the member, and the payment was to be made by him as such, and in case of his default he ceased to be a member, and forfeited all claim upon the association. 2d. That the notice directed to Y. having been duly mailed on the day of its date, there was no necessity for proving its actual receipt by him. 3d. That the full thirty days having expired without payment, and the party having died ten days thereafter, he was not a member at the time when he died, and by his default lost his membership and all the benefits appertaining thereto. 4th. That the fact that he was part of the time sick and wholly unable to attend to business, constituted no sufficient legal excuse for the default whereby this consequence was produced. 5th. That there was nothing in the case that could be fairly construed to operate as a waiver on the part of the association, of its right to insist on the forfeiture under said article: *Yoe v. Benjamin C. Howard*, *Sonic Mut. Ben. Ass.*, 63 Md.

MALICIOUS PROSECUTION.

False Imprisonment—Improper Motive—Lawful Warrant.—A person who has procured the arrest and imprisonment of another on a lawful warrant is not liable to an action for false imprisonment, although his object in making the complaint upon which the warrant was issued was to enforce the payment of a debt: *Mullen v. Brown*, 138 Mass.

MASTER AND SERVANT. See *Corporation*.

MECHANICS' LIEN.

What required to give a Lien on Property of a Railroad Company.—Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished for the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad

company, that may be essential in the operation and maintenance of its road for the public purposes for which it was established: *Buncombe County Commissioners v. Tommey*, S. C. U. S., Oct. Term 1884.

MORTGAGE.

Account between Mortgagor and Mortgagee—Adverse Possession by Mortgagee.—As between mortgagor and mortgagee, where the latter is in possession in the acknowledged character of mortgagee, the principles are plain and well defined, and are applied for the mutual benefit of both parties. But where the possession is held adversely to the mortgagor, with denial of the right of redemption, the principles of the account are quite different, and are applied with more or less rigor against the wrongdoer, according to the circumstances of the case: *Booth v. Baltimore Steam Packet Co.*, 63 Md.

Purchase by Mortgagee—Merger—Foreclosure of subsequent Mortgage.—If the owner of land, who holds it subject to two mortgages made by his predecessors in title, conveys it, reserving an easement therein, to the first mortgagee, by a warranty deed, in which the grantee assumes and agrees to pay both mortgages and to hold the grantor harmless therefrom, the first mortgage is extinguished; a foreclosure of that mortgage by a sale under a power contained therein, is invalid; and the second mortgagee may maintain a writ of entry against the first mortgagee to foreclose the second mortgage: *Kneeland v. Moore*, 138 Mass.

NEGLIGENCE. See *Common Carrier; Corporation.*

OFFICER. See *Corporation.*

PARTITION.

Right to—Discretion of Court.—Where a case is fairly brought within the law authorizing a partition, the right to partition is imperative, and absolutely binding upon courts of equity. They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it, and yet commit no error. To invoke this equitable remedy is a matter of right, and not of mere grace: *Hill v. Reno*, 112 Ill.

In the event that a partition could be effected only through the instrumentality of a sale of the premises and a distribution of the proceeds of such sale among the several parties in interest, the mere fact that difficulties may arise in the adjustment of the distribution, or inconveniences, or even possible losses result from the change in the relations of the parties to the estate, by reason of a sale, will in nowise affect the absolute right to have partition. *Id.*

PARTNERSHIP. See *Agent.*

Notice of Dissolution—Evidence.—In an action against the members of a partnership upon a promissory note, and on an account annexed for goods sold and delivered, if one of the issues is whether the plaintiff had notice of the dissolution of the partnership, a notice of such dissolution published in a newspaper is competent, in connection with other evidence tending to show that the plaintiff saw and read the notice: *Smith v. Jackman*, 138 Mass.

an action against the members of a partnership upon a promissory note, and on an account annexed for goods sold and delivered, one of the issues was whether the plaintiff had notice of the dissolution of the partnership. He testified that he had no knowledge of such dissolution until after the bringing of the action. One of the partners, who alone defended the action, was allowed to put in evidence certain bills or statements of account for goods sold and delivered to him personally by the plaintiff at various times after the cause of action had accrued. *Held*, the plaintiff had no ground of exception: *Id.*

PATENT.

Re-issue—Delay in applying for—Decision of Patent Office—General demurrer.—The bill set out the grant of the original letters patent and its invalidity by reason of an insufficiency or defect in the specification which had arisen through inadvertence, accident or mistake; their surrender and the granting of re-issued letters, after a decision by the patent office board of appeal that the delay in the application for the re-issue (more than five years) had been sufficiently and satisfactorily explained, and that there was not in the renewed application any attempt to enlarge the scope of the invention beyond what was originally disclosed. On general demurrer, *held*: that the question whether the delay had been reasonable or unreasonable was for the court to determine, and the decision of the patent office could not avail the complainant, and no special circumstances having been shown to account for and explain the delay the re-issue must be considered void and the bill dismissed: *Wallsack v. Rehrer*, S. C. U. S., Oct. Term 1884.

POSSESSION.

Adverse Possession by Fraudulent Grantor as against Grantee—Evidence—Assessment of Taxes.—If A. is entitled to a conveyance of land, by an agreement between A. and B., in order to defraud A.'s creditors, the land is conveyed to B., a title to the land by adverse possession more than twenty years may be acquired by A. against B., although B. is without means to pay his debts during such possession, if B. shows that A. is holding the land adversely and under a claim of right during his possession: *Elwell v. Hinckley*, 138 Mass. At the trial of a writ of entry, if the demandant relies upon a title acquired by his grantor by adverse possession, the books of the assessors of the town in which the land lies are admissible in evidence for the purpose of showing that the land was assessed to the demandant's grantor during the period of the alleged adverse possession: *Id.*

RAILROAD. See *Agent*; *Common Carrier*; *Mechanics' Lien*.

RECEIVER. See *Corporation*.

REMOVAL OF CAUSES.

Separate Controversy—Contest over Ownership of Stock—The Corporation a Necessary Party.—A suit in equity brought by C., a citizen of one state, against the corporation of the same state, and T., a citizen of another state, and W., to obtain a decree that C. owns shares of the stock of the corporation standing in the name of W., but sold by him to T., and that the corporation cancel on its books the shares standing

in the name of W., and issue to C. certificates therefor, cannot be removed by T. into the Circuit Court of the United States, under section 2 of the act of March 3, 1875 (18 St. 479); because the corporation is an indispensable party to the suit, and is a citizen of the same state with C.: *Crump v. Thurber*, S. C. U. S., Oct. Term 1884.

Corporations Created by the United States—Suits arising under the Laws thereof.—Such corporations as the Union Pacific Railway Company and the Texas and Pacific Railway Company, created by and organized under Acts of Congress, are entitled, under the act of March 3d 1875, to remove suits brought against them in the state courts, into the United States Circuit Courts, on the ground that such suits are suits "arising under the laws of the United States:" *Pacific Railroad Removal Cases*, S. C. U. S. Oct., Term 1884.

Separate Controversy—Actions in Tort against several Defendants who file separate Answers.—An action for damages for the malicious prosecution of a previous action, which had been commenced by a writ of attachment brought in a state court against several defendants who separate in their answers, cannot be removed under the second clause of § 2 of the act of March 3, 1875, into the United States Circuit Court by one party of the defendants on the ground that the plaintiffs and themselves are citizens of different states and that there is in the cause a controversy wholly between them: *Pirie v. Toedt*, S. C. U. S., Oct. Term 1884.

SUBROGATION. See *Bank*.

UNITED STATES.

Pre-emption Land—Patent therefor—Impeachment of.—It is the duty of the land department, of which the secretary of the interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contest by a mere intruder without title, in an action at law brought by the patentee to recover possession: *Ehrhardt v. Hogaboon*, S. C. U. S., Oct. Term 1884.

Jurisdiction—Citizenship—Creditor's Sale—Addition as Plaintiffs of Citizens of the same State as Defendants.—A United States Court having obtained jurisdiction on the ground of citizenship of a creditor's bill, will not lose it because others are added as plaintiffs, and it does not thereafter appear that the controversy is wholly between citizens of different states. Other creditors coming in under such a bill can either become co-complainants, or appear before the master under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree: *Stewart v. Dunham*, S. C. U. S., Oct. Term 1884.

WITNESS.

Prochein Ami—Husband and Wife.—A *prochein ami* is not a party to the suit within the meaning of the clause of the Evidence Act, which declares that where an original party to a contract or cause of action is dead, or where an executor or administrator is a party to the suit, neither party shall be admitted to testify on his own offer, or upon the call of his co-complainant or co-defendant otherwise than now by law allowed, unless a nominal party merely: *Trahern v. Colburn*, 63 Md.

In an action against an executor by a married woman suing by her husband as her next friend, he is a competent witness in her behalf: *Id.* And the fact that he was directly interested in fixing a liability upon the estate of the deceased, because of his liability over to his wife in respect of the transactions as her agent, does not exclude him from testifying: *Id.*

WILL.

Devise to Heirs at Law—Distribution per stirpes.—A testator devised his estate to his wife during her life, and after her death directed that £100 be paid to his daughter, and gave to his daughter-in-law (the widow of his deceased son), a lot, and then directed, "the remainder of my estate to be divided equal among my heirs at law." The widow died when a partition was asked, and it appeared that the testator had but two children, a daughter still living, and a son who died before the testator, leaving children: *Held*, that his heirs took *per stirpes*, and the daughter took *per capita*, in the remainder of the estate, so that the daughter took one-half and the heirs of the son the balance: *Kelley v. Vidas*, 112 Ill. 400. Where a devise is made to a class of persons not named, as "heirs at law" of the testator, so that reference has to be made to the statute to ascertain the persons who constitute his heirs, the provisions of the statute as to the quantity each shall take must also govern. In such cases the estate devised will be divided among his heirs, as in cases of intestacy: *Id.*

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THE LAW OF JUDICIAL NOTICE.

As a general principle of trial-practice courts are to be guided, reaching their conclusions, only by the evidence adduced in the particular case and by the rules of law applicable to it. There are, however, certain classes of facts which are not properly the subject of testimony, or which are regarded as universally established by common notoriety, and these, being held to rest within the knowledge of the judge, need not be proved in the case. Of such facts the court is said to "take judicial notice." It is the purpose of this article to describe in outline the chief subjects of judicial notice and the principles by which courts are directed in taking official notice of them.

Constitution and Laws of the United States.—In the first place, courts are always presumed to know the laws under which they act and which they are to administer. This is obviously essential to the first steps in judicial proceedings. And accordingly, the branch or division of the body of the law which applies to the matter within the jurisdiction of the court need not be established by evidence of fact, but will be officially noted. And since the Constitution of the United States, the public acts of Congress, and the laws made by the Federal Government with foreign nations form part of the "supreme law of the land," it follows that all courts, whether national or state, will take judicial notice of their provisions.

As to treaties, see *United States v. Schooner Peggy*, 1 Cranch 103. So state courts are bound to take notice of the internal revenue laws of Congress, and to refuse to aid parties in any attempt to violate them, whether the point is raised by counsel or not: *Kessel v. Albertis*, 56 Barb. 362. The same is true of national bankrupt laws and their practical operation: *Mims v. Swartz*, 37 Texas 13. And it has been held that the President's proclamation of "universal amnesty and pardon" is a public act of which all the courts of the United States are bound to take notice and to which they are bound to give effect: *Armstrong v. United States*, 13 Wall. 154. So also courts will take notice of the government survey and the legal subdivisions of the public land: *Atwater v. Schenck*, 9 Wis. 160. But the state courts are not bound to notice the *rules* of the departments of the federal government, or of the board of land commissioners or surveyor-general, *e. g.*, that original papers are not to be taken from their files. Such rules, if essential, must be shown by affidavit or otherwise: *Hensley v. Tarpey*, 7 Cal. 288. Nor are courts required to know officially the various orders issued by a military commander in the exercise of the military authority conferred upon him: *Burke v. Miltenberger*, 19 Wall. 519.

II. *Public Laws of the State.*—Since the common or unwritten law of the state, together with its general and public statutes, constitute an integral part of the domestic jurisprudence, these also are proper subjects for the judicial cognisance of the court: *Lane v. Harris*, 16 Ga. 217. As also the time when a public law takes effect: *State v. Bailey*, 16 Ind. 46. And it is held that the appellate court, if in doubt as to the true reading of a statute, will of its own motion inform itself thereof by referring to the original act on file in the office of the secretary of state: *Clare v. State*, 5 Iowa 509. Whether or not the official knowledge of the court should be understood to extend to the journals of the two houses of the legislature, is a mooted question. It has been so held in Alabama and Michigan: *Moody v. State*, 48 Ala. 115; *People v. Mahaney*, 13 Mich. 481; and denied elsewhere: *Grob v. Cushman*, 45 Ill. 119; *Coleman v. Dobbins*, 8 Ind. 156. But at any rate it appears to be settled that when it becomes the duty of the court to inquire into the validity or constitutionality of a statute, recourse may be had to the legislative journals. The courts are required to be acquainted with the whole body of domestic law; but of course it is an essential prerequisite to such acquaintance that

should have knowledge of any acts which are invalid, unconstitutional, or not in force. The judges must be able to determine whether or not a bill has been passed in accordance with all the constitutional provisions, whether or not it received the requisite majority to pass it over the governor's veto, whether or not it answers the test in respect to singleness of subject-matter and title, and so on; and such determination becomes impossible unless reference can be made to the official records of the legislative body. *People v. May*, 13 Mich. 481; *Moody v. State*, 48 Ala. 115; *Opinion of the Judges*, 35 N. H. 579; *Pangborn v. Young*, 32 N. J. Law 29. It is equally settled that the court cannot go behind the records of the legislature to inquire into the regularity of their proceedings in passing an act: *People v. Devlin*, 33 N. Y. 269. On the whole, the courts are inclined to favor the liberal and wise rule laid down by the United States Supreme Court in the case of *Gardner v. The Collector*, 6 Wall. 511: "We are of opinion, on principle as well as authority, that whenever a question arises in a court of law of the validity of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for the answer which in its nature is most appropriate, unless the positive law has enacted a different rule." But in considering the proceedings of the legislature, the court has no judicial knowledge whether or not there are proper and legitimate modes of expending money in carrying out the passage of an act; and therefore it cannot say that the government in an answer of such expenditure, with such purpose and result, is either immaterial or vicious: *Judah v. Trustees*, 16 Cal. 56.

nor is the court restricted, in noticing the laws of the state, to the allegations of the pleader. For example, where a bill concerns the interests of the state and is professedly for their protection, the court will take official notice of the established law, even though it contradicts such allegations: *State v. Jarrett*, 17 Md. 309. It follows as a corollary from what has already been said that the court will take judicial notice of the repeal of any law of the state: *People v. O'Connor*, 13 La. Ann. 486. Even where proceedings are begun under a certain statute, and, pending an appeal, that statute is repealed, the appellate court is bound to notice such repeal,

though it forms no part of the case as reported for their judgment: *Springfield v. Worcester*, 2 Cush. 52. The laws relating to highways are public statutes of which the courts will take judicial notice: *Town of Griswold v. Gallup*, 22 Conn. 208. And the same is true of bank-charters: *Davis v. Bank of Fulton*, 31 Ga. 69; though see *Bank v. Gruber*, 87 Penn. St. 468.

But private and special acts of the legislature, relating only to a limited number of persons, are not laws of which the courts are required to take official cognisance. This rests upon two reasons. In the first place, they are not matters of such public notoriety that judges are presumed to know them at all events. And secondly, they are not in reality the public laws of the state, but rather in the nature of a contract between the legislature, in their representative capacity, and the individuals who are supposed to derive benefit from them. *Leland v. Wilkinson*, 6 Pet. 317; *Timlow v. Reading Railroad*, 10 W. N. C. 436; *Bank v. Gruber*, 87 Penn. St. 468; *Legrand v. Sidney College*, 5 Munf. (Va.) 324. It is often essential to determine whether a given act is public or private, and to this end the court in Indiana has laid down the following rule: To constitute a statute a public act it is not necessary that it should extend to all parts of the state; it is a public act if it extends equally to all persons within the territorial limits described in the statute: *Levy v. State*, 6 Ind. 281. Yet a special act for the survey of a particular tract of land is not such a public law as the courts are required to know judicially: *City of Allegheny v. Nelson*, 25 Penn. St. 332. And, as further illustrating this distinction, it is held that while the court knows judicially all the statutes under which plank-road companies are organized, yet it cannot know judicially under which one any particular company was formed, or whether it has not adopted the provisions of some other act: *Danville, &c., Co. v. State*, 16 Ind. 456. In accordance with the principles of the rule above stated, it is decided that an act relating to the powers of a single municipal corporation is in its nature public, though not in terms declared to be so, and must be judicially noticed by the courts; *Fauntleroy v. Hannibal*, 1 Dill. 118. So also special laws enacted by a territorial legislature, creating towns or cities municipal corporations, are public acts: *Prell v. McDonald*, 7 Kans. 426. And the courts will take judicial notice of the power and authority of a city to improve its streets: *Macey v. Titcombe*, 19 Ind. 135; and that the streets of a

are public highways: *Whittaker v. Eighth Ave. Railroad Co.*, 100 N. Y. 650; but not of the width of the streets or of the sidewalks, in a city, nor of the city ordinances establishing the same, or prescribing or limiting their extent: *Porter v. Waring*, 100 N. Y. 250. It is well settled that courts of general jurisdiction, created by the authority of the state, cannot take judicial notice of the city ordinances or police regulations of any municipality: *Case v. Mobile*, 30 Ala. 538; *Porter v. Waring*, *supra*. But a city court will officially notice such ordinances; and it stands in the same attitude towards the municipal laws of the city that a state court occupies in reference to the public laws of the state: *State v. Leiber*, 11 Iowa 407. It appears that private documents, though requiring proof by evidence, need not be specially authenticated, but may be exhibited as other documents, unless admitted by consent: *Legrand v. College*, 5 Munf. (Va.) 324.

I. *International Law*.—The law of nations, being co-extensive with civilization, must also be judicially noticed by all courts. It is the law merchant, so far as the same is a part of the private law of nations, is not a subject for proof as matter of fact, but is to be noticed and applied by the court: *Jewel v. Center*, 25 Ala.

So also it has been said in Connecticut, "By common consent and general usage, the seal of a court of admiralty has been judicially noticed as sufficiently authenticating its records. No objection has prevailed against the reception of a decree of a court acting on the law of nations when established by its seal. The seal is deemed evidence of itself, because such courts are considered as courts of the whole civilized world, and every person interested as a party." *Hampson v. Stewart*, 3 Conn. 181. And the same is equally true of the general principles of the laws of navigation. Thus, where a set of rules of navigation (prescribing the different kinds of lights to be used on vessels) has been issued by a foreign government, and is adopted as obligatory by more than thirty of the principal commercial nations of the world, the courts may take judicial notice of the fact that by common consent of mankind these rules have been acquiesced in as of general obligation. The law maritime does not require proof as a foreign law: *The Scotia*, 14 Wall. 170. So the national flag and seal of all civilized countries is recognized by the courts: *Watson v. Walker*, 23 N. H. 496. And to further illustrate the same principle—acts which are criminal by the common law and the laws of all civilized countries will be pre-

sumed to be contrary to the laws of any state of the Union: *Cluff v. M. B. Ins. Co.*, 13 Allen 308.

As a principle somewhat analogous to the preceding, it is held that the official seal of a notary public is self-proving everywhere; in other words, that the courts of one jurisdiction will take notice of the authority of a notary public, commissioned in another state to administer oaths and perform other duties incident to his official capacity, without any other authentication than his signature and notarial seal, and will infer therefrom that he was duly appointed by the governor of such state: *Denmead v. Maack*, 2 McArthur 475; *Browne v. Philadelphia Bank*, 6 S. & R. 484.

IV. *Judicial Notice of State Law in the Federal Courts.*—Whenever questions arise in the courts of the United States which depend upon points of state law, the adjudicating tribunals will take judicial notice of all such laws: *Merrill v. Dawson*, 1 Hemp. 563; *Jones v. Hays*, 4 McLean 521; *Mewster v. Spalding*, 6 Id. 24; *Pennington v. Gibson*, 16 How. 65. So the Supreme Court will take official cognisance of any law of any state which may be necessary to the determination of the questions before it, and the circuit courts will notice the laws of all states within their territorial jurisdiction. This principle may rest upon either of two foundations. (1.) "The circuit courts of the United States are created by Congress, not for the purpose of administering the local laws of a single state alone, but to administer the laws of all the states of the Union, in cases to which they respectively apply:" *Owings v. Hull*, 9 Pet. 625; and since, as we have already seen, every court is presumed to know the whole body of the law which it is intended to administer, it follows that these courts must be acquainted with the state laws. (2.) In the contemplation of the federal tribunals the states are not "foreign," but are all component parts of the general government and territorially within its jurisdiction: *Bennett v. Bennett*, Deady 309. In this matter the United States courts are governed by the same rules which direct the tribunals of the particular state; *e. g.* as respects the difference between public and private statutes, and the fact that the latter cannot be judicially noticed. So, where a certain act of incorporation is declared to be a public act, so that the state courts may include it within their judicial notice, the federal courts will do likewise: *Covington Drawbridge Co. v. Shepherd*, 20 How. 227. And so of a statute giving a county authority to subscribe for stock in a

road company, and to issue its bonds in payment thereof: *Smith Tallapoosa Co.*, 2 Woods 574. To this rule, however, there is an important exception, viz.: that while the courts of one state cannot generally notice the laws of a sister state, the judicial knowledge of a national court is not confined to the enactments of the state where it happens to be sitting at the particular time, but extends at all times to the laws of all other states within its jurisdiction. For it would be absurd to make the scope of the judicial knowledge shift and vary in correspondence with the venue of the particular action.

As a general rule, when the proper construction of a state statute has been fixed and settled by the court of last resort in that state, the same construction will be adopted by the federal courts sitting within her borders: *Elmendorf v. Taylor*, 10 Wheat. 152.

V. *Laws of Sister States, how regarded.*—It is a general rule that foreign laws are matters of fact to be pleaded and proved. As municipal laws have no extra-territorial force, they cannot be regarded, strictly speaking, as law when they are brought before a tribunal foreign to the jurisdiction that enacted them. And the only reason why such tribunals enforce them at all is, because it is supposed that contracts made in foreign countries are made with reference to the laws there prevalent, and that those laws have thus become incorporated in such contracts. To enforce the contracts, therefore, it is necessary to enforce the laws. But as they are not proper subjects for the administration of the domestic tribunal, they must be alleged as matter of fact, and their existence and tenor must be established by testimony. Now the states of the American Union, except in so far as it is otherwise provided in the federal constitution, are regarded as independent sovereignties, and their mutual relations as those of foreign powers in close alliance and friendship. It follows from this that the laws of each state are "foreign" in the other states, and cannot be judicially noticed, but must be pleaded and proved as facts. This proposition is abundantly supported by the authorities: *State v. Stade*, 1 D. Chip. 303; *Erritt v. Woodruff*, 19 Vt. 182; *Hempstead v. Reed*, 6 Conn. 30; *Kline v. Baker*, 99 Mass. 253; *Knapp v. Abell*, 10 Allen 35; *Ames v. McCamber*, 124 Mass. 85; *Miller v. Avery*, 2 Barb. Ch. 582; *Hosford v. Nichols*, 1 Paige Ch. 226; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; *Whitesides v. Poole*, 9 Rich. (S. C.) 68; *Simms v. Southern Ex. Co.*, 38 Ga. 129; *Shed v. Augustine*, 14

Kan. 282; *Irving v. McLean*, 4 Blackf. 52; *Rothrock v. Perkinson*, 61 Ind. 39; *Hyman v. Bayne*, 83 Ill. 256; *Carey v. Railroad*, 5 Iowa 357; *Brimhall v. Van Campen*, 8 Minn. 13; *Rape v. Heaton*, 9 Wis. 328; 1 Daniel on Negotiable Instruments, § 865.

But there are certain modifications which have been engrafted upon this rule. Thus, where one state recognises acts done in pursuance of the laws of another state, its courts will take judicial notice of those laws, so far as may be necessary to determine the validity of the acts alleged to be in conformity with them: *Carpenter v. Dexter*, 8 Wall. 513. So also, where a question arises under the Act of Congress requiring that full faith and credit be given in each state to the public acts, records, and proceedings of every other state, the domestic tribunal will take judicial notice of the local laws of the state from which the record comes; for the very sensible reason that their proceedings, in such case, are subject to review in the Supreme Court of the United States, and since in that court the states are not regarded as foreign, and their individual laws are officially noticed, the same rule should obtain, under these circumstances, in the state courts. As remarked by Woodward, J., "It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that, in questions of this sort, we should take notice of the local laws of a sister state in the same manner the Supreme Court of the United States would do on a writ of error to our judgment:" *State of Ohio v. Hinchman*, 27 Penn. St. 479; *Paine v. Insurance Co.*, 11 R. I. 411; *Rae v. Hulbert*, 17 Ill. 572; *Butcher v. Bank*, 2 Kans. 70. It has been said, in Georgia, that the judges, on the trial of a cause, may proceed on their personal knowledge of the laws of another state, and that their judgment will not be reversed, in consequence of their so doing, unless it appears that their decision was erroneous as to those laws: *Herschfeld v. Dexter*, 12 Ga. 582. But this seems to be an isolated case. As showing the practical operation of this rule, we may cite the following: The courts cannot judicially know the rate of legal interest in a sister state: *Clarke v. Pratt*, 20 Ala. 470; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; nor what share would fall to a given heir of an intestate who died domiciled in another state: *McDaniel v. Wright*, 7 J. J. Marsh. 475; in an action on a contract made in another state, and specifying no particular place of

formance, the court will not, on a demurrer to the declaration, take judicial notice of a law of such state which, applied to the contract, would render it void: *Jones v. Palmer*, 1 Dougl. (Mich.) 9; an averment of *lis pendens* in the courts of another state does not necessarily import that the defendant has appeared or been served with process, and hence is not a good plea in abatement: *Howell v. Newton*, 10 Pick. 470.

Another important exception to the rule that the laws of one state are foreign to the courts of another and must be pleaded and proved, is found in the fact that where one state is formed out of territory originally belonging to another, the courts of the new state will recognise as a part of their domestic jurisprudence all laws of the other state which were in force at the time of the separation, unless repealed, directly or by implication, in the new state. Thus the courts of Kentucky will take judicial notice of the laws of Virginia existing before the former state became independent of the latter: *Delano v. Jopling*, 1 Litt. (Ky.) 417. And the same is true of states which were formerly within the dominion of foreign nations. So the Spanish laws which prevailed in Louisiana before its cession to the United States, and upon which the titles to land in that state depend, must be judicially noticed and expounded by the courts of Louisiana: *United States v. Turner*, 11 How. 663. So also our courts will take judicial notice of the statute law of Great Britain in force before the separation; but the statutes of that country created since the revolution cannot be judicially noticed or established before our courts, except in the same manner and by the same proofs as the criminal laws of any foreign state: *Ocean Ins. Co. v. Fields*, 2 Story 59.

VI. *Foreign Laws—How Proved.*—The laws of any foreign state or country being thus seen to be without the judicial cognisance, we next to consider the methods of proving them before the court when they become material to the controversy. A concise rule has been laid down by the United States Supreme Court, as follows: "The existence of a foreign law, written or unwritten, cannot be judicially noticed, unless it be proved as a fact, by appropriate evidence. The written foreign law may be proved by a copy of the law properly authenticated. The unwritten must be proved by the oral testimony of experts." *Ennis v. Smith*, 14 How. 426; *Frith Sprague*, 14 Mass. 455. In regard to the written law, and first to the mode of authenticating it, it is held that the great seal of

a state affixed to the exemplification of a law is sufficient proof of itself, inasmuch as the public seal is a matter of notoriety and will be judicially noticed as a part of the law of nations acknowledged by all: *Robinson v. Gilman*, 20 Me. 300; *State v. Carr*, 5 N. H. 367. And it has been decided by the supreme federal tribunal that, under the Act of May 26th 1790, prescribing the manner in which the public acts, records and proceedings of the several states shall be authenticated, no other authentication of an act of the legislature is required than the annexation of the seal of the state; and it is presumed that the person who affixed the seal had competent authority to do so: *United States v. Amedy*, 11 Wheat. 392. In regard to foreign countries, however, it is essential that the person certifying the exemplification of the law should be one whose duty and prerogative it is to do so. Thus, it is not a consular function to authenticate the laws of a foreign state, and the certificate of a United States consul to that effect is not evidence: *Church v. Hubbard*, 2 Cranch 187. And again, "the certificate and seal of the minister resident from Great Britain in Hanover is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions. It is not connected in any way with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office:" *Stein v. Bowman*, 13 Pet. 209. The general rule, then, is that the exemplification must be under the great seal of the state. As between the several states of the Union, however, a more liberal rule obtains. In general, the written laws of a sister state may be proved by printed volumes, printed by the authority of such state, and purporting to contain the public acts of its legislature. In point of fact, this rule is dictated by principles of convenience, and affords a method of proof more satisfactory even than that by certified copy. It may now be regarded as established in a majority of the states. Thus it is said in Pennsylvania: "Printed volumes purporting to be on the face of them the laws of a sister state, are admissible as *prima facie* evidence to prove the statute laws of that state:" *Mullen v. Morris*, 2 Penn. St. 87. And in Massachusetts it is held that where a printed volume of the laws of another state contains the words "By authority" on the title-page, that is a sufficient authentication to allow it to be introduced in evidence: *Merrifield v. Robbins*, 8 Gray 150. In New Hampshire it was

ce said that such printed volume was admissible if, according to the testimony of a counsellor of that state, it was there cited and received by the courts: *Lord v. Staples*, 23 N. H. 448; but a later decision holds it sufficient if it purports on its face to be authenticated by authority: *Emery v. Berry*, 28 N. H. 487. And see, to the same effect, *Thomas v. Davis*, 7 B. Mon. 227; *Clanton v. Barnes*, 50 Ala. 260; *Barkman v. Hopkins*, 11 Ark. 157; *State v. Abbey*, 29 Vt. 60; *Simms v. Southern Ex. Co.*, 38 Ga. 129; *Throck v. Perkinson*, 61 Ind. 39; *Bradley v. West*, 60 Mo. 34. A contrary doctrine is held in North Carolina: *State v. Twitty*, 2 N. C. 441. Whether or not a similar authentication is sufficient under the statute law of a foreign country is a question not yet entirely decided; but the current of judicial opinion seems to require that the volume offered to prove such laws must be shown, by extraneous evidence, to be duly authorized by the government of the foreign country. Thus, a printed copy of the Irish statutes, when supported by the oath of an Irish barrister to the effect that he had received them from the king's printer in Ireland, and that they are good evidence there, may be used to show the laws of Ireland: *Jones v. Maffet*, 5 S. & R. 523. So, also, where a printed volume of the laws of a British province is shown by the testimony of witnesses to have received the sanction of the executive and judicial officers of the province, as containing its laws: *Owen v. Boyle*, 15 Me. 147. But an act of the Parliament of Great Britain cannot be proved by an alleged transcript of it in the "Canada Gazette," although the latter is an official newspaper: *Each v. Workman*, 20 N. H. 379.

It is generally settled that the common or unwritten law of a foreign state may be proved by parol evidence of experts. And to constitute one an expert, for this purpose, it is not necessary that he should be a lawyer, provided it appears that he has been in a position which might reasonably be supposed to require familiarity with his part with such laws. Thus it is said: "The law of a foreign country on a given subject may be proved by any person who, though not a lawyer, or not having filled any public office, is or has been in a position to render it probable that he would make himself acquainted with it;" *American, &c., Co. v. Rosenagle*, 77 Penn. St. 55; *Hall v. Costello*, 48 N. H. 179. The construction given to the statute of a foreign state, by usage and by judicial decisions, is a part of its unwritten law, and should be proved by the testimony

of experts: *Dyer v. Smith*, 12 Conn. 384. In Massachusetts it is provided by statute that the books of reports of cases adjudged in the courts of other states are admissible in evidence to prove the unwritten law of those states: *Cragin v. Lamkin*, 7 Allen 395; *Ames v. McCamber*, 124 Mass. 91.

' While it is firmly settled that foreign laws must be proved as facts, there is much diversity of opinion as to whether the proof of them should be addressed to the court or to the jury. On the one hand, it is the province of the jury to decide upon questions of fact. On the other hand, it is the undoubted prerogative of the court to rule upon matters of law. Judge STORY (Conflict of Laws, § 638) says: "The court are to decide what is the proper evidence of the laws of a foreign country; and, where evidence is given of those laws, the court are to judge of their applicability, when proved, to the case in hand." And the same rule has been asserted in New Hampshire: *Pickard v. Bailey*, 26 N. H. 152. But in Massachusetts it is held that the construction to be put upon foreign laws after they are proved is a question for the jury, with such instructions to assist them in ascertaining and applying the law as may be deemed proper: *Holman v. King*, 7 Met. 384. And again: "When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. * * * Where the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone:" *Kline v. Baker*, 99 Mass. 254. Perhaps the rule that is most closely in accordance with both reason and elementary law is that laid down in the following language: "The existence of a foreign law is a fact. The court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect, is the province of the court. It is a matter of professional science; and, as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them, more than on our own statutes. It is the office of reason to put a construction on any given document, and therefore it naturally arranges itself among the duties of the judge." *State v. Jackson*, 2 Dev. (N. C.) 563. These latter views are logi-

ally, ably, and dogmatically supported by the learned author of *Bishop on Marriage and Divorce*, Vol. I., § 419.

VII. *Presumption that the Foreign Law is the same as Our own.*—We frequently see it stated that the law of any foreign country is presumed to be the same as our own. This means that where a contract, or other matter in dispute, is on its face to be governed by a foreign law, and no proof of that law has been adduced, and it is not such that the court can take judicial notice of the adjudicating tribunal will proceed upon the basis of its *own* laws, not being informed in what respect the foreign law differs, or presuming, within certain restrictions, that it is identical. Thus, as a general rule, it is presumed that the "common law" prevails in each of the United States: *Monroe v. Douglass*, 5 N. Y. 447; *Whitford v. Panama Railroad Co.*, 23 Id. 465; *Copley v. Sandford*, 2 La. Ann. 335; *Rape v. Heaton*, 9 Wis. 328; 1 Whart.

Ev., § 314. In illustration of this rule, it is held that *champerty*, being an offence at common law, is to be presumed to be against the law of another state, the contrary not appearing: *Whurston v. Percival*, 1 Pick. 415. Again, in Massachusetts the giving of a promissory note is evidence of payment of a pre-existing debt—the law will be presumed the same in Maine: *Ely v. James*, 123 Mass. 44. Whether or not the *statutes* of another state are presumed the same as ours is a question propounded, but not decided, by the New York court in the case of *McCulloch v. Woodward*, 58 N. Y. 563. Probably not; since foreign statute-law is so easily susceptible of proof.

There are several exceptions to this rule of presumption. In the first place, it is plainly in accordance with natural justice that all contracts and judicial proceedings had abroad should be presumed legal and valid, until the contrary is shown. Hence, if a contract, made with reference to foreign laws and to be governed thereby, would be void or illegal by the law of the forum, the court will not presume the foreign law to be the same as the domestic, for the mere purpose of defeating the contract, but on the contrary, in the absence of proof, will understand the contract to be valid by the foreign law. In other words, the presumption of legality and validity is stronger than the presumption of identity of laws: *Bishop on Mar. & Div.*, § 412; 1 Whart. on Ev., §§ 314, 1250; *James v. Palmer*, 1 Dougl. (Mich.) 379. For example, if the offence is *usury*, and the contract would be usurious under the

domestic law, the court will not presume that the *lex loci contractus* is identical and so overthrow the contract; the defendant must prove the foreign law as matter of fact: *Campion v. Kille*, 15 N. J. Eq. 476; *Cutler v. Wright*, 22 N. Y. 472; *Davis v. Bowling*, 19 Mo. 651. So also courts will not take judicial notice of the revenue laws of another country: *Randall v. Rensselaer*, 1 Johns. 94. So where suit was instituted upon a promissory note made in Jamaica by one who was under age, and no evidence was offered of the laws of Jamaica, it was held that the court would not presume those laws to be the same, in respect to minority as a defence, as the laws of the forum, and the plaintiff was entitled to recover: *Thompson v. Ketcham*, 8 Johns. 190. In the second place, this presumption cannot reasonably be extended to countries whose usages and customs are wholly different from ours, and whose system of laws has nothing in common with our own jurisprudence, either in respect of origin, traditions or theories. Thus there is no presumption that the common law is in force in Russia: *Savage v. O'Neil*, 44 N. Y. 298. Nor among the Cherokee nation: *Duval v. Marshall*, 30 Ark. 230. Nor in Turkey: *Dainese v. Hale*, 91 U. S. 13. Nor, finally, can the presumption of identity of laws be attached to any local idiosyncrasies or peculiarly intra-territorial regulations. As remarked by a distinguished writer, "It would be preposterous to assume, even *prima facie*, that our Statute of Frauds, or our fluctuating liquor laws, or our laws for the collection of revenue, prevail in Japan." 1 Bishop M. & D., § 412. And by another: "Nor can a judge, as to a notoriously peculiar domestic rule, assume without absurdity that such rule obtains in a sister state." 1 Whart. on Ev., § 315. In conclusion of this part of our subject, it is held that where a statute of another state has once been recognised as the law of that state by a decision of the domestic courts, the latter will thereafter take judicial cognisance of the statute, and until it be proved that the law has been changed, will presume it still in existence: *Graham v. Williams*, 21 La. Ann. 594.

VIII. *Judicial Notice taken of other Courts and their Judges.*
—As a general rule, all courts in the United States will take judicial notice of the fact that tribunals are established in the several states for the adjustment of controversies and the ascertainment of rights: *Dozier v. Joyce*, 8 Port. (Ala.) 303. But in regard to recognising particular courts in other states, the practice is not so

harmonious. Thus the courts of Kansas will take judicial notice of the constitutions of sister states, and in an action on a judgment of the Court of Common Pleas in Pennsylvania, will recognise the fact that by the constitution of that state that court is a common-law court having original and appellate jurisdiction: *Butcher v. Brownsville*, 2 Kans. 70. On the other hand, the courts of Wisconsin will not take judicial notice that there are county judges in New York or that they are authorized to administer oaths: *Fellows v. Menasha*, 11 Wis. 558. Of course all courts will officially recognise those which are superior to them or co-ordinate with them, and their practice. And it may now be regarded as settled that appellate courts will take notice of the inferior courts and who are their judges: *Tucker v. State*, 11 Md. 322; *Kilpatrick v. Commonwealth*, 31 Penn. St. 198. But see *Ripley v. Warren*, 2 Pick. 96. So the circuit court will take judicial cognisance of who are the justices of the peace for the county in which it is held, and will require no proof of their official character unless that particular point is directly in issue: *Chambers v. People*, 5 Ill. 351; *Hibbs v. Blair*, 14 Penn. St. 413. And the Supreme Court of a state should take notice of the times prescribed by law for holding the terms of the various courts of the state: *Lindsay v. Williams*, 17 Ala. 229; *McGinnis v. State*, 24 Ind. 500; *Davidson v. Peticoas*, 34 Tex. 27. But the superior courts will not take judicial notice of the customs, rules, practice or proceedings of inferior courts of limited jurisdiction, unless justice requires it, when revising the judgments of such courts: *March v. Commonwealth*, 12 B. Mon. 5. Or unless, we may add, the organization and practice of such courts is regulated by statute, in which case it would be included in the judicial knowledge which the court has of all the laws of the state. In California it is stated that where a party relies upon the rules of practice of the district courts he must have them incorporated in the record, as the Supreme Court cannot judicially notice them: *Cutter v. Caruthers*, 48 Cal. 178. The court will always take judicial notice of all prior proceedings in a case; hence it is unnecessary to offer evidence of a former trial and the verdict returned on such trial, on the hearing of a plea in bar of "once in jeopardy" by such trial and verdict: *State v. Bowen*, 16 Kans. 75. And where an appearance is entered in the inferior court, and is not withdrawn, and an appeal is taken to this court, and the judgment below is reversed and remanded, and, after proceedings

there, another appeal is taken to this court, this court will judicially know what attorneys have appeared in the cause : *Symmes v. Major*, 21 Ind. 443.

IX. *Executive and other Officers.*—The courts of a state are presumed to know who the state executive may be at any time when the fact may be called in question : *Deweese v. Colorado County*, 32 Texas 570. So it will be judicially noticed that a certificate, indorsed on the bond of a county treasurer by the deputy auditor-general of the state, was so indorsed by an officer of the state : *People v. Johr*, 22 Mich. 461. And the same is true of the officers of a county. Thus courts will officially notice the appointment or election of sheriffs, as well as of other executive or administrative officers, and treat them as officers *de facto* when the validity of their acts is called in question in a collateral manner ; *Thompson v. Haskell*, 21 Ill. 215 ; *Dyer v. Flint*, Id. 80. So of tax-collector and his signature : *Wetherbee v. Dunn*, 32 Cal. 106. And of the genuineness of the signatures of the county officers and of such deputies as the law authorizes : *Himmelmänn v. Hoadly*, 44 Cal. 213. But see, as a peculiar case, *Shropshire v. State*, 12 Ark. 190. It is well settled that a court may take judicial notice of who are its own officers : *Dyer v. Last*, 51 Ill. 179. And also of the genuineness of its own records and of the signatures of its own officers : *State v. Postlewait*, 14 Iowa 446.

X. *Historical Events.*—All courts are presumed to have an official knowledge of general history, and they will require no proof of events and circumstances which were of such universal notoriety and affected so large a proportion of the population, at the time of happening or afterwards, that they may be regarded as a part of the public history of the country. Further than this it would be extremely difficult to lay down an affirmative principle of distinction. Such matters are judicially noticed by reason of their *notoriety* ; and Wharton's description of notoriety is as follows : " Evidence is not needed to establish that which is so notorious to persons of ordinary intelligence that it either admits of no doubt, or could at the moment be established by a profusion of indisputable testimony." Law of Evidence, Vol. I., § 330. As illustrations of this public notoriety, though not as embodying a principle of distinction, may be cited the following instances : The separation of the Methodist Church, in 1844, into two bodies north and south of a line, was an event that connected itself with and formed a part of the history

the country, and hence will be judicially noticed: *Humphrey v. Inside*, 4 Bush (Ky). 215. The courts of Alabama will officially notice the fact, as a part of contemporary history, that in 1867 people of that state were in a condition of great financial embarrassment and insolvency, and that in consequence of such state affairs it may not have been practicable for a guardian, at that time, to make a safe investment of a large sum of money, without delay after its receipt: *Ashley v. Martin*, 50 Ala. 537. The court will judicially notice the agreement between Lord Baltimore and William Penn relating to the boundary line between the two provinces, as it is a part of the public history of Pennsylvania: *Thomas v. Stigers*, 5 Penn. St. 480. So also the history of the Six Nations of Indians is a part of the history of New York of which the courts will take judicial notice, as well as of the extinction of the Indian title to a certain tract of land within the state: *Howard v. Moot*, 64 N. Y. 271. But it is said that while courts will judicially notice matters of public history, yet it is generally necessary to produce *some* evidence upon the point sought to be established, as by contemporary chronicles, &c.: *McKinnon v. ...*, 21 N. Y. 206.

XI. *The Course of Nature*.—In the next place, it is well settled that judicial notice will be taken of the ordinary course of nature in the rotation of the seasons; and so of the general course of agriculture, with reference, for example, to the maturity of the crops: *Floyd v. Ricks*, 14 Ark. 286. So a court will take notice without proof that a mortgage made in January upon a cotton crop upon a crop not yet in being: *Tomlinson v. Greenfield*, 31 Ark. ... But on the other hand, it cannot be judicially known to the court that the concentric layers in the trunk of a tree mark each a year's growth of the tree and thus indicate its age: *Patterson v. Causland*, 3 Bland (Md.) 69. Nor can notice be taken of mere vicissitudes of climate or of the seasons or special alternations of weather: *Dixon v. Nicholls*, 39 Ill. 372. So it is said that the almanac has long been regarded and held as a part of the law of the land. And the court will notice the coincidence of days of the month with days of the week, as shown by the almanac: *Allman Owen*, 31 Ala. 167. As, if a bill or note bears date on a certain day of the month, the court will judicially notice if such day were a Friday: 1 Daniel on Negot. Instr., § 70. And further, the court will take judicial notice that the date on which a judgment by

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default was recorded in a given year was or was not a day of a term such that the same was not prematurely rendered: *Bethune v. Hale*, 45 Ala. 522. Moreover, the ordinary limitations of human life are a proper subject for judicial cognisance. For example, where it is evident, from the time of their ancestor's death, that his children must have arrived at full age before suit was commenced, the court will judicially notice such fact: *Floyd v. Johnson*, 2 Litt. (Ky.) 109.

XII. *Geographical Features and Civil Divisions*.—Courts are bound to take judicial notice of the leading geographical features of the country; but the minuteness of such knowledge is inversely proportional to the distance, being much more specific and detailed in regard to the territory over which the court has jurisdiction than with respect to foreign lands or even different states. Thus courts will be presumed to be acquainted with the great geographical features of the states—such as lakes, rivers and mountains, and of the division of the state into counties, cities and towns, and their relative position: *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Hinckley v. Beckwith*, 23 Wis. 328; *Goodwin v. Appleton*, 22 Me. 453; *Martin v. Martin*, 51 Id. 366. And of the navigability of streams: *Neaderhouser v. State*, 28 Ind. 257. But not of the precise boundaries and distances, nor of the local situation and distances of the different places in counties from each other: *Goodwin v. Appleton*, *supra*. But the area of an established county is known to the court without proof: *Commissioners v. Spittler*, 13 Ind. 235.

In regard to the names of towns and their situation, (a controverted point), it was said in Illinois that where the premises in litigation were described as "lot five in block one in Haley's addition to the city of Monmouth," the Supreme Court would take judicial notice that there is a city of Monmouth in Warren county, Illinois, and would presume that to be the city intended: *Harding v. Strong*, 42 Ill. 148. But it is the general rule that the higher courts of the state can only notice those civil divisions which are established and prescribed by the legislature. Thus the Supreme Court of Indiana cannot judicially know the names of the townships composing a given county, for the townships are established by the board of county commissioners, not by the legislature: *Bragg v. Rush County*, 34 Ind. 406. However, it is permitted them to notice that the state and the township are distinct political organiza-

ons: *LaGrange v. Chapman*, 11 Mich. 499. As to how much knowledge is required of points outside the state, the decisions are not entirely harmonious. It has been held that the courts cannot judicially know of the existence of a town or city of a specified name, as New Orleans, New York, Janesville, not lying within the state; *Riggin v. Collier*, 6 Mo. 568; *Woodward v. Railroad*, 21 Wis. 309; *Whitlock v. Castro*, 22 Tex. 108; *Richardson v. Williams*, 2 Port. (Ala.) 239. But these decisions are not satisfactory, and it is difficult to conceive any substantial reason why courts should be presumed ignorant of the existence and location of those well known centres of traffic and commerce which are so familiar in the every-day parlance of private individuals. And see *Rice v. Montgomery*, 4 Biss. 75. At any rate, it is apprehended that this restriction could not be applied to the courts of the United States; for the reasons given above for their judicial knowledge of the laws of various states. And the more important geographical features of the United States, considered as one country, may be judicially noticed; *e. g.* that the state of Missouri is east of the Rocky Mountains: *Price v. Page*, 24 Mo. 65. In regard to the length of time required to make a railway journey, or for carriers to transport goods, from one designated city to another, the prevailing doctrine seems to be that a court will require proof, not being able to determine officially what time should be allowed: *Rice v. Montgomery*, *supra*. But in a recent Pennsylvania case it was held: "We apprehend that the ordinary speed of railway trains is a matter for judicial cognisance, and hence a very simple calculation will demonstrate with approximate certainty the time within which mails may be transported between such cities as New York and Pittsburgh;" and hence an instruction that "there was nothing improbable in the idea that a notice of protest could reach Pittsburgh the day following the maturity of the note," was not erroneous; although "perhaps the learned [trial] judge went too far in stating that a train leaving New York at five or six in the evening could reach Pittsburgh the next morning at eight:" *Pearce v. Lang*, 101 Penn. St. 512. And in another instance the court took judicial notice of the usual duration of voyages across the Atlantic by steam or other packet ships, so far as to determine that one who was proved to have taken passage on a particular vessel, which vessel had not yet been heard from after a great lapse of time, must be dead: *Oppenheim v. Wolf*, 3 Sandf. Ch. 571.

There are but few cases illustrating the rules of judicial notice as applied to the geographical features of foreign countries, but those cases exhibit an unexpected liberality. Thus the Louisiana court once took notice that the river Mersey in England is filled with salt water, the tide ebbing and flowing therein to a great height: *Whitney v. Gauche*, 11 La. Ann. 482. And in the case of *The Peterhoff*, Blatchf. Prize Cas. 463, the court even went so far as to take judicial notice of the situation of a town in a foreign country, and that a bar exists at the mouth of the river on which that town lies, which vessels of the draught of the ship in suit cannot cross.

XIII. *Customs and Usages*.—Whenever a custom is public, general and notorious, it will be judicially noticed by the court without proof. This is true, for example, of the custom of merchants to charge interest on their accounts after six months: *Koons v. Miller*, 3 W. & S. 271; *Watt v. Hoch*, 25 Penn. St. 411. And so of ordinary and familiar abbreviations, such as "admr" for "administrator:" *Moseley v. Mastin*, 37 Ala. 216. But not where the custom is confined to a particular trade, with which the court cannot reasonably be supposed to be acquainted. Thus the court cannot know officially the meaning of printers' marks at the foot of an advertisement, and, in the absence of further proof upon the subject, will not infer that such marks indicate the date and number of times a notice has been published: *Johnson v. Robertson*, 31 Md. 476. The court will take judicial notice of the wages of ordinary labor: *Bell v. Barnet*, 2 J. J. Marsh. (Ky.) 516.

XIV. *Matters of Political Economy and Conclusions of Science*.—The different classes of notes and bills in circulation as money at a particular time will also be judicially noticed: *Hart v. State*, 55 Ind. 599. It is in accordance with this principle that the Massachusetts court said: "We must take notice, in common with the people, that bank notes derive their value not only from the certainty but the facility of payment; consequently that a man in trade in Boston, holding a bill issued by a bank at a distance from Boston, can less easily obtain payment than he could if the issuing bank was near to him: and that the different facility of procuring payment of different bills may create a difference in their value:" *Jones v. Fales*, 4 Mass. 252. The courts will also recognise the legal coins made at the United States mint pursuant to law, and such foreign coins as are made current by law. Hence, in prosecutions for counterfeiting, it is not necessary to prove that there are

ine coins of which those alleged to have been made are imitations: *United States v. Burns*, 5 McLean 23. It is not error to instruct the jury that they may infer that gin is intoxicating, without any evidence of its properties or qualities: *Commonwealth v. Peckham*, 2 Gray 514. And the same is true of whiskey: *Egan v. State*, 53 Ind. 162. But not of malt liquors: *W v. State*, 56 Ind. 188. But whether or not benzine is of a like nature with camphene or spirit gas, is not a matter of which the court can take judicial notice; it must be left to the jury: *W v. Insurance Co.*, 92 Penn. St. 15. But the court will take the magnetic variation from the true meridian: *Bryan v. Akley*, 6 Litt. (Ky.) 91. And so of the art of photography, the mechanical and chemical principles employed, the scientific principles on which they are based, and their results: *Luke v. Calhoun*, 52 Ala. 115. And finally, the court will take judicial notice of the construction and uses of that useful instrument, the ice-cream freezer: *Brown v. Piper*, 91 U. S. 37

H. CAMPBELL BLACK.

Williamsport, Pa.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Missouri.

STATE OF MISSOURI ex REL. BALTIMORE & OHIO TELEGRAPH CO. v. BELL TELEPHONE CO.

... a Massachusetts corporation, and the owner of a patent on a telephone, used B., a Missouri corporation, to do the telephone business of St. Louis, on condition that B. should not establish telephonic connection with any telephonic company unless specially authorized by A. A. permitted B. to establish telephonic connection with the Western Union Telegraph Company. Thereafter the Baltimore & Ohio Telegraph Company applied for a mandamus to compel B. to permit telephonic communication between it and the petitioner. A. was not made a party: *Held* (1), that A. was not a necessary party; (2) that all other telephonic companies were entitled to the same privilege granted the W. U. Co., upon paying the same price; and that the petitioner was entitled to the relief asked. TREAT, J., dissenting

APPLICATION for a mandamus.

Garland Pollard, for petitioner.

E. T. Allen, for defendant.

BREWER, J., (Orally)—In this case, I regret to say that my brother TREAT and myself do not agree fully as to the rights of the parties. It is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri—the company having the telephone business of this city—to permit telephonic communication between it and the petitioner, the Baltimore & Ohio Telegraph Company. The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business, it may not establish telephonic connection with any telegraph company, other than that permitted by the licensor—the holder of the patent—the Massachusetts company; and it further appears that such licensor has permitted telephonic communication with the Western Union Telegraph Company.

Now the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish communication with any other individual, or company, than that permitted by its license from the patentee. I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions; just as in the warehouse cases (*Munn v. State of Illinois*, decided by the Supreme Court of the United States, and reported in 94 U. S. 113), it was held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say, "You may charge so much, and no more, for

transaction of this business." He puts his property into the channels of commerce—as multitudes are doing—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is within the power of the public, speaking through its legislature, or the power of the court enunciating general rules operative upon such transactions, to modify leases, modify licenses, control duties. And, notwithstanding this licensor has given to the licensee the right to establish a telephonic system in the city of St. Louis, with such telephonic communication with only certain prescribed telegraph systems, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the state of Missouri, and the control of the courts, thus forcing the obligations of a common carrier.

A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "my license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, at that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So, my conclusion is that, notwithstanding the terms of this license, which seem to inhibit it from dealing with or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for mandamus will be sustained.

TREAT, J.—This is an application, it must be borne in mind, against the licensee, who has a license only in accordance with the terms thereof, and we are asked to mandamus that licensee to do that he has no authority to do under the terms of his license. I know of no power in a court which can change a contract between

the licenser and the licensee, and give him a contract other than what he has made, either by enlargement or diminution. If this application had been made against the American Bell Telephone Company, which holds the patent,—the patentee,—it would have been a very different question, and the views suggested by my brother judge would then come up for consideration. But how is it that this licensee, who has only a restricted privilege, can by a mandamus of this court be ordered to do what under his contracts he cannot do? Can we make a new contract? Now, so far as the American Bell Telephone Company is concerned, which holds the patent, it reserved for itself the right with respect to telegraphic connections; and it is alleged in this petition that it has granted that to one company. Now, if the American Bell Telephone Company was here, as between it and this party petitioner, the question presented by my brother judge would have arisen, and in that, possibly, we might not have differed at all.

This matter is not a new one in the courts. In the noted case in Ohio the court proceeded not as in this case, because there were two parties defendant or respondents, to wit: the American Bell Telephone Company, that had all these rights, with which it had not parted; also the local company, and the charter of the state in connection therewith. There is no such case here. A like case to this was reviewed very elaborately by the Connecticut Supreme Court (I think in 49 Conn.),¹ where precisely the views I am expressing were entertained, and they seemed to me a demonstration, and express much more clearly and forcibly than I can do in this summary manner, the true doctrine arising out of the sanctity of contracts. If this party wishes the American Bell Telephone Company to grant equal privileges to it with another telegraph company, let it pursue it—make it do what it is asked—but I cannot see, by any true theory of the law, why this local party is to have its rights enlarged, and its duties correspondingly enlarged, in violation of the contract under which it rests.

There may be many reasons, of course, no judicial notice of them being taken, why this restriction was made, to wit: Here is a telephonic system in St. Louis. Each one of you present here may wish, under the terms stated, to have such telephonic connection. It is stated in the license, which is a contract, that no one of you

¹ *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352.

shall use that for the purposes of taking tolls thereon. In other words, if I have a telephonic connection in my house, and I pay whatever the figure is for it, I am not to open a general telephonic system there, and let the whole neighborhood come in and use my telephone, and pay me therefor, and thus destroy the telephone company's income. It is a personal right, restricted to the use of the individual and his immediate needs. When you bring a telegraph company into operation in connection with it, what would happen? At the telegraph stations here probably there are thousands of messages coming in every day. It is receiving for these telegrams a given amount of money, and taking its tolls thereon. Further than that, instead of doing as heretofore, employing its messengers to do this work, we are asked to compel this telephone company to do that messenger work for it, as an individual would do in permitting his telephone to be used 400 to 500 times a day—it may be for general purposes—and the whole telegraphic business of the country poured on this telephonic system and done at a low figure. That, I suppose, was one of the reasons why this restriction was put there.

But suffice it to say, in my judgment there is no authority for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there end his duties, obligations and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented. It cannot arise in this way.

BREWER, J.—I may be pardoned for suggesting, and I do it with great deference, because as you all know I share with all the members of the bar in this district in a profound admiration for my brother TREAT, that there are two things which seem to me to make against his argument very strongly. I agree with him that if this telephonic system had refused a telephonic connection with any telegraph company, that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established a telephonic connection with one telegraph company, I think, every other telegraph company has equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer; and the further practical question, that while there may be a contract

between the licensor and the licensee, the licensor is not a citizen—an inhabitant—of or found within this district. Suppose this petitioner went to Massachusetts, and obtained a decree there binding the licensor; that would not bind the licensee; that would not disturb the contract, so far as the licensee is concerned. Would the court in Massachusetts have entertained a suit seeking to establish a naked legal right, and without practical benefit to any one? The licensee does not live in Massachusetts. The licensor does not live in St. Louis. Practically, of what avail would a decree be against a licensor in Massachusetts? Would it bind the licensee here? Haven't you got, in a last resort—a last analysis for practical results—to come right to the licensor, the holder, the proprietor of the telephonic system here?

TREAT, J.—You omit one consideration (and I may say we are not going into a discussion of the question on the bench,) but it so happens that the licensor, by the very terms of his license, is the only party to make connection. He has done it, and the licensee has nothing to do with it. If you compel the licensor, in whom alone is reserved this privilege, to equalize the matter, he does it; it is immaterial whether the licensee agrees with whatever the licensor says shall be done. Hence the licensee wouldn't be a necessary party anywhere.

GENERAL RULE OF EQUALITY AND REASONABLENESS.—The questions under discussion in the foregoing case have already been considered by some courts. In *Am. Union Tel. Co. v. Bell Telephone Co.*, 10 Cent. L. J. 438, the telegraph company applied to the telephone company for an instrument to be placed in its office. The telephone company refused, and a mandamus was asked and granted, compelling it to do so. Judge THAYER said: "The principles of law applicable to railroad companies and to other common carriers unquestionably apply to telegraph and telephone companies. Having established their lines and adopted a uniform mode of serving the public, consistent with their chartered powers, they must treat all persons similarly situated with respect to those lines alike, and without unjust discrimination. It is

not for them to select whom they will serve, or impose conditions of service on one class of customers that do not apply equally to all persons occupying the same relative positions toward the company. * * * If it erects its main line along a certain street or streets, under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instruments to residents along such line for private use, and by making connections between such instruments and its main lines: above all, if it holds itself out to the public as prepared to furnish such instruments, and make such connections for all who may apply, then I should say that its duty to the public compels it to treat all residents along such

line, with absolute impartiality. It cannot grant such facilities or render such service to one citizen or corporation, and refuse like privileges to his next door neighbor. * * * It follows, from the principles above stated, that in refusing to grant to the relator, such facilities as it affords to other customers, it has violated an imperative duty imposed upon it by law." See also, 11 Cent. L. J. 359 (St. Louis Circuit Court).

The same point came before the Kentucky court sitting in chancery. Plaintiffs were proprietors of public carriages, and defendants were a telephone company that was also a proprietor of public carriages. The court said: "The real contention between plaintiffs and defendants is confined to their carriage services; the defendants insisting that against the plaintiffs, rivals in that business, they have a right to a monopoly in the use of their own telephonic methods of communicating and receiving orders for carriages; that a mere rival in one branch of their business, cannot force them to afford him the facilities which they have provided for another branch of their business. Upon the facts appearing upon the petition and affidavits of the plaintiffs, it is the opinion of the court that the defendants are engaged in two distinct employments—one operating a telephonic exchange, and the other operating a carriage service. They are not rivals in the former business, and as to that part of the defendant's business they occupy the same position towards the plaintiffs as they do towards the rest of the public. The defendants are a quasi public servant, and as such are bound to serve the general public, including the plaintiffs, on reasonable terms, with impartiality. They are governed by the principles of the law of common carriers. * * * The principles announced in an opinion by Judge THAYER, in *Am. Union Tel. Co. v. Bell Telephone Co.*, should determine this controversy."

Louisville Transfer Co. v. Am. District Tel. Co., 24 Al. L. J. 283.

The Supreme Court of Nebraska has rendered a similar decision in *State v. Nebraska Telephone Co.*, 24 Am. L. Reg. 263. Respondent was the owner of, and conducted a system of public telephone exchanges in Nebraska and Iowa, including in its circuit about 1500 telephone instruments, supplied by it to that number of subscribers, upon the terms fixed by itself. Relator applied to be admitted as a subscriber, and was refused. He tendered a full compliance with all the rules of the company. His place of business was accessible, no reason being shown why his request should not be granted. On an application for a mandamus, *held*, that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand must supply to all alike, without discrimination, and that having to supply the demand in the city of Lincoln, wherein the relator resided, and being fully able to furnish him with a telephone instrument, the same as its other subscribers, it was its duty to do so. And so also, has decided the Supreme Court of Ohio: *State v. Bell Telephone Co.*, 36 Ohio St. 296.

Similar conclusions have been reached by courts with reference to a board of trade, and its duty to its quotations of prices to the public without unjust discrimination. Thus in *Public Grain and Stock Exchange v. W. U. Tel. Co.*, 16 Fed. Rep. 289, TULEY, Chancellor, speaking of the exchange or board of trade said: "It may be true that neither the courts nor the legislature can interfere with its control of its own floor, or with the right of the board to discipline its members. But I am clearly of opinion that the business transacted upon the floor of the board of trade is 'affected with a public interest' to an extent which would authorize the legislature, and the courts in the absence of legislation, to prohibit

the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public. It is opposed to the very spirit of its charter that it become monopoly, or a corporation." But see *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 825; *Bradley v. W. U. Tel. Co.*, Cincinnati Commercial Gazette, April 8th 1883; cited 17 Fed. Rep. 834.

So also with reference to gas companies. Perhaps the best case affirming the duty of a gas company to serve all alike is *Shepard v. Milwaukee Gas-Light Co.*, 6 Wis. 547. In this decision the duty is grounded upon the fact that a gas company is a practical monopoly, and as such, bound to serve alike all who are similarly situated, and who desire gas. It was even intimated in this last case, that dealers in groceries or other commodities, might be under a similar duty toward the public. "But suppose," said the court, "the citizen was prohibited from obtaining soap, candles, or carriages from any other than the particular corporation, how would the case stand? Could such company wantonly refuse to sell to the citizen upon the usual terms?" *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 547. That a gas company must serve all who desire gas, see also, *N. O. G. L. & B. Co. v. Paulding*, 12 Rob. (La.) 378; *G. L. Co. v. Colliday*, 25 Md. 1; *People v. Manhattan G. Co.*, 45 Barb. 136; *Bedding v. Imperial G. Co.*, 7 Gas Jour. 418; *Penny v. Rosendale U. G. Co.*, 14 Id. 937.

The duty of railway, express, and telegraph companies to serve the public without unreasonable discrimination, either in prices or facilities, has been so often and so peremptorily affirmed by courts of the highest authority that as a principle, its acceptance is at least professed by most managers of those companies, however short of living up to its

full meaning, they may come in the actual transaction of their business. As sustaining the application to these companies of the principle of reasonableness and equality, reference may however be made to the following decisions: *McDuffee v. Railroad Co.*, 52 N. H. 447; *N. E. Ex. Co. v. M. C. Rd. Co.*, 57 Me. 194; *Bennett v. Dutton*, 10 N. H. 481; *Sanford v. Railroad Co.*, 24 Penn. St. 378; *Munn v. Illinois*, 94 U. S. 113; *Winona, &c., Rd. Co. v. Blake*, Id. 180; *N. J. Nav. Co. v. Merchants' Bank*, 6 How. 382; *Vincent v. C. & A. Rd. Co.*, 49 Ill. 33; *C. & N. W. Rd. Co. v. People*, 56 Id. 365; *C. & A. Rd. Co. v. People*, 67 Id. 22; *People v. A. & V. Rd. Co.*, 24 N. Y. 269; *Southern Express Co. v. Iron Mountain Rd. Co.*, 3 McCrary 147; *Southern Ex. Co. v. Louisville & Nashville Rd. Co.*, 20 Am. L. R. (N. S.) 590; *State v. H. & N. H. Rd. Co.*, 29 Conn. 538.

The conclusions deduced by the writer from a study of the foregoing and other similar adjudications may be stated as follows: A corporation may by its charter or some statute, be made a public company. Public corporations must, because they are public, serve the public without unreasonable discrimination, either in prices or facilities.

While the fact that a public corporation is public, obligates it to deal equally by all, yet this fact is not the only reason, if indeed it be a reason at all, for imposing a similar duty upon boards of trade, telephone, railway, telegraph, gas, water, or other such companies. Ordinarily such companies are private, not public corporations, and their duties to the people result, not from their status as public or private corporations, but from the nature of the business they are engaged in.

That business, whether it consist in supplying transportation, communication, gas, water, quotations of prices or anything else, is serving the public, and when any one even a private person, undertakes to serve the public, he or it must render the service, whatever it may

be, impartially for all, and without undue preference or unjust prejudice towards any. It is the fact that the service is for the public, and not the legal status of the servant that determines the rule of law that governs its performance.

Especially will the rule of equality and reasonableness, be applied where the servant has a legal or practical monopoly of the services offered. It is probable that complaint of discrimination will arise only where a monopoly exists, for so long as there is competition, buyers unable to make satisfactory contracts with one dealer, may readily do so with another. But even where competition exists, it may be doubted whether a public dealer in any commodity may wantonly, unreasonably and injuriously prefer one customer to another.

CONFLICTING CASES.—While the weight of authority is believed by the writer to sustain these conclusions, it is not to be understood if the cases sustain them. Many courts decided differently. Thus with reference to gas companies, Judge BIGELOW says "No public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use or consumption. It is entirely at their own option, whether they will exercise their corporate rights and privileges at all; and if they undertake to manufacture and dispose of gas, the extent to which they shall carry on their business, is left to their own election. Nor is any power conferred upon them to take private property not previously appropriated to a public use, for the purpose of exercising and enjoying their franchise. The only right and privilege given to them, is to dig up public streets and ways for the purpose of laying down their mains and pipes:" *Commonwealth v. Lowell G. L. Co.*, 12 Allen 75.

So, also, with reference to telephones ;

in *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn. 352, wherein the Connecticut Telephone Company, organized as a joint-stock corporation under the general law of Connecticut for the purpose of constructing and using within the state mechanism for telephonic communication, purchased from the Bell Telephone Company, a Massachusetts corporation, which owned a patent for a telephone, a license for a term of years, to use its device within a certain district in Connecticut; the contract containing a provision, that no telegraph company, without the consent of the licensors, (who designated one company for the purpose), should be allowed through it, to collect and deliver messages from and to its customers. Another telegraph company which had a station in the district, having demanded of the Connecticut corporation the same benefit with the other company, with an offer of payment, and been refused, applied for a mandamus to compel the corporation to grant the benefit. *Held*, in refusing the application, that the Massachusetts corporation, owning the patent had a right in granting licenses for its use to impose whatever restrictions it chose; that the Connecticut corporation therefore acquired a right only to the restricted use of the patented device, and its duty to the public, did not extend beyond that restricted use; that the statute (Session Laws of 1879, ch. 36, amending Gen. Statutes, p. 342, sect. 8) requiring all telegraph and telephone companies to receive dispatches from all other telegraph and telephone lines, and transmit them on payment of the usual charge, could not operate to compel the Connecticut corporation to do what it had no right to do; that a Massachusetts statute to the same effect was to be regarded as applying to the action of the Massachusetts corporation as a carrier of speech in that state, and as not affecting its right to manufacture its instruments or sell or lease them in other states as the owner of the patent.

With reference to this case and the opinion of Judge TREAT in the principal case, this may be said: If the decisions that a telephone, telegraph, railway or other such company cannot discriminate in serving the public are sound, then the provision in the contract of the Bell Telephone Company with its licensees, that they shall furnish instruments only to such companies as may be designated by the licensors, is an unlawful stipulation. It is, therefore, no contract at all, so far at least as this provision is concerned. The licensees being governed in the distribution of their instruments by no provision whatever, or, what is the same thing in law, by a null and void provision, would be at liberty to furnish them to whomever they pleased, and of course indiscriminately. Such being their contract relation with their licensors, compelling them by mandamus to serve all the public alike, would not as suggested by Judge TREAT, be making a new contract for the parties. It would simply be enforcing their duties to the public in a matter not covered by any contract which the law could recognise.

Still, as has been already intimated, there is considerable conflict of authority concerning the public duties of these companies. See, with reference to boards of trade and their duty to furnish the public with quotations of prices, *Bryant v. W. U. Tel. Co.*, 17 Fed. Rep. 825. As to gas companies, see further *McCune v. Norwich City G. Co.*, 30 Conn. 521; *Commonwealth v. Gas L. Co.*, 12 Allen 75; *Paterson G. L. Co. v. Brady*, 27 N. J. L. 245; *Pudsey Coal G. Co. v. Corporation of Bradford*, L. R., 15 Eq. 167; *Houlgate v. Surrey Consumers G. Co.*, 8 Gas Jour. 261; *Hoddesdon G. & C. Co. v. Haselwood*, 6 C. B. (N. S.) 238; 8 Gas Jour. 261; *Com. Bank of Canada v. London G. Co.*, 20 U. C., Q. B. 233.

PRICE REGULATIONS.

1. *By the State or Municipality.*—It is the undoubted right of the legislature to

regulate the price of whatever may be sold by a public servant to the people. A strong case upon this point is *Spring Valley Waterworks Co. v. Bartlett*. The Spring Valley Waterworks was organized under a statute providing that the price of the water furnished to San Francisco and its citizens should be fixed annually by two persons appointed by the city, two by the corporation, and one to be chosen by the other four, and in case they could not agree, by the sheriff of the county. Art. 14, of the California constitution, subsequently adopted, changed this mode without the consent of the company, and provided that the price of the water should be fixed annually by the board of supervisors of the city and county alone, giving the company no voice in the matter: *Held*, that such change was not void on the ground of taking private property for public or private use without compensation or without due process of law as conferring the sole power to fix the price upon the purchaser nor as impairing the obligation of a contract: *Held*, also that the fact that candidates for the office of supervisor pledged themselves to the people to fix prices, &c., in accordance with the requirements of the resolutions of a public meeting nominating them before election, did not disqualify the supervisors elected upon such pledges from acting in fixing the price of water: *Spring Valley Waterworks v. Bartlett* (California 1883, U. S. Circuit Court), 2 Am. & Eng. Corp. Cas. 94. See also *Spring Valley Waterworks v. Schottler*, 2 Am. & Eng. Corp. Cas. 122.

2. *By the Company.*—The company supplying the gas, water, communication, etc., may itself make reasonable charges therefor; *Parker v. Boston*, 1 Allen 361; *Cromwell v. Stephens*, 3 Ab. Pr. (N. S.) 26; *Allentown v. Henry*, 73 Penn. St. 404. But a city or water company cannot make unwarranted discriminations in particular cases or arbitrary charges with the penalty of forfeiture of the

right to use the water provided for the benefit of all the citizens, making a fair compensation for its use : *State v. Mayor, &c., of Jersey City*, 46 N. J. L. 297 ; *Dayton v. Quigley*, 2 Stew. Eq. 77 ; *Parker v. City of Boston*, 1 Allen 361 ; *Young v. City of Boston*, 104 Mass. 95 ; *Kip v. Paterson*, 2 Dutch. 298.

There are two ways in which water-rents may be rated and collected, one by meter, and the other by house-rates and estimates. A city or water company may adopt either, but it cannot put into a house an expensive meter—costing say \$200—and compel the house owner or occupant to pay the price of it in addition to his regular water-bills, and it would appear from this case that water charges should be fixed primarily with a view to paying expenses of operating and maintaining the water system, and interest or dividends on the capital invested, together with the principal, if the water system be the property of the city ; *State v. Mayor, &c., of Jersey City*, 46 N. J. L. 297. Water rents assessed on vacant lots at rates adopted by the board of works at its discretion and without regard to special benefits or valuations are illegal : *Jersey City v. Vreeland*, 14 Vroom 638 ; *Provident Ins. for Savings v. Allen*, 37 N. J. Eq. 36 ; *State v. Mayor*, 45 N. J. L. 256. And laches is not a bar, on certiorari to set aside such rents as having been assessed in an unconstitutional manner.

Water supplied for "domestic" use may be used without incurring liability for extra charge, for washing a horse and carriage, &c., in a coach-house and stable on the premises of the rate payer's residence : *Busby v. Chesterfield Co., E., B. & E.* 176.

A building in New York was a large structure of eight stories, each story composed of lodging rooms adapted to the use of one person only. Above the basement it was used exclusively as a lodging house. The rooms were small, from four to six feet wide and eight feet long,

and were let to lodgers at a fixed rate per night. There were no arrangements for boarding or cooking for guests, the place being adapted above the basement only for lodgings. Nor was there any bar or restaurant belonging to or connected with plaintiff's occupation of the building. Held, that this structure was not chargeable for water as a "hotel;" *Cromwell v. Stephens*, 3 Ab. Pr. (N. S.) 26.

A person occupying, with his family a suite of rooms in a building also occupied by other families, and having separate water attachments connected with a pipe which supplied the whole building, and on which pipe a meter was fixed, can by injunction, restrain the company from cutting off his supply, because he insists upon paying for the water used by himself, rather than have the owner of the building (also objecting) pay for the water used by all the tenants, and then attempt to subdivide the sum paid by the owner among the various tenants : *Young v. Boston*, 104 Mass. 95.

Security in the shape of a deposit of money or otherwise, may be required of a consumer, as a guaranty of the payment of his regular rates : *Shepard v. Milwaukee Gas Co.*, 6 Wis. 549. The company may demand an increase of the deposit where that given is insufficient to protect his large and increasing consumption bills : *Ford v. Brooklyn G. L. Co.*, 10 N. Y. Supreme Ct. 621. When the deposit is refunded to the consumer, the company may cut off the gas : *Littlewood v. Equitable Gas Co.*, 8 Gas J. 541. But see *Spratt v. South Met. Gas Co.*, 7 Gas J. 663 (1858), deciding that where the company's charter gave them no authority to demand a deposit, they had no right to require one as a condition to supplying gas, and in *Westlake v. St. Louis*, 77 Mo. 47, it was held that payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion, and if the charge is excessive, the excess may be

recovered without tendering the amount really due. The deposit demanded must however, be reasonable in amount; if it be unreasonable—*e. g.*, 2*l.* asked, where 1*l.* would have been sufficient—it may be compelled to furnish its gas or water on payment of the reasonable deposit: *Samuel v. Cordiff G. Co.*, 18 Gas J. 192.

In an action for damages for refusal to supply plaintiff with gas, it appeared that plaintiff made a deposit of 2*l.* 10*s.*, as requested, that at the end of the next quarter, a bill was rendered to him by the gas company, of 1*l.* 19*s.* 6*d.*; that in June following, the plaintiff was notified that unless he paid the bill at once, the gas would be cut off by the company; that he refused payment on the ground that the deposit more than covered the amount of the bill, and on June 18th the gas was cut off, and the company sent him a bill for 3*l.* 14*s.* 6*d.*, minus the deposit of 2*l.* 10*s.*; that the plaintiff was thereupon summoned before the magistrate, and compelled to pay 19*s.* 6*d.*, a charge of 5*s.* for cutting off the gas being disallowed, and that afterwards the plaintiff requested the company to resume the supply, which they refused to do, unless he paid the expense of putting it on again; *Held*, that the cutting off was illegal, and the company was liable for damages: *Halfhive v. Worthing Gas Co.*, 22 Gas J. 136.

In a suit for damages for the refusal of a gas company to supply him with gas, the court said there were "three grounds of defence alleged, *vis.*: 1st, That the plaintiff was a joint contributor and that this was a partnership debt; 2d, That on entering the premises he did not give notice to the defendants; 3d, That the company was not bound to furnish a supply of gas, but on all of these points the opinion was in favor of the plaintiff, and that a gas company had no right to deprive a tenant of his supply because of a disputed debt which he had expressed his willingness to pay

if a court of law should decide he was liable:" *Penny v. Rosendale U. G. Co.*, 14 Gas J. 927.

Where the security taken by the company was a demand note signed by plaintiff, on which payment was immediately demanded and the gas shut off because plaintiff requested a short delay in payment: *Held*, that the security for the payment of the gas bills still existed, and that the refusal of the company to supply gas was not authorized by the statute: *Fowler v. Chartered Gas Co.*, 17 Gas J. 908.

Inability to pay, or non-payment of current bills for consumption, warrants the company in shutting off the water or gas: *People v. Manhattan G. L. Co.*, 45 Barb. 136; *Morey v. Metropolitan G. L. Co.*, 38 N. Y. Superior Ct. 185.

Furnishing an applicant for gas without objecting to his non-payment of bills, will not estop a company from refusing to supply him upon a subsequent application on the ground that his former bills are unpaid: *People v. Manhattan G. L. Co.*, 45 Barb. 136.

But the non-payment relied upon to justify the shutting off of water or gas must be that of the person whose water is shut off. Non-payment by his tenant, his landlord, or by some other person with whose liability he is in no way a privy, will not suffice. See *Dayton v. Quigley*, 29 N. J. Eq. 77.

A gas company cannot require the owner of a building to pay an amount due by a former owner for gas, as the condition of supplying him: *N. O. G. L. & B. Co. v. Paulding*, 12 Rob. (La.) 378; *Morey v. Metropolitan G. L. Co.*, 38 N. Y. Sup. Ct. 185. And a promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own benefit, and in consequence of a threat by the company having the exclusive privilege of vending gas that unless the amount be paid no gas would be furnished, is void: *N. O. G. L. & B. Co.*

v. *Faulding*, 12 Rob. (La.) 378. And where a company, having the right to cut off water from any consumer on failure to pay in advance, notified all of them that after March 1st the rates would be advanced from \$10 to \$12, and on March 1st P. tendered \$10 for the ensuing year, which the company refused to receive, but allowed the water to run upon P.'s premises for the next two years: *Held*, that it could only recover \$20, because it might have stopped the supply March 1st: *Aqueduct v. Page*, 52 N. H. 472.

So where several contracts are made between the same parties, for different pieces of property, each requiring its own meter, a failure to comply with terms in relation to one, furnishes no excuse or ground to the company to withhold the gas from the other: *G. L. Co. v. Colliday*, 25 Md. 3.

Application.—A company may require its consumers to make a written application for a supply of gas, water, &c. But where a gas company has a right to insist that a customer shall make an application in writing for a supply of gas in a certain form but upon an oral application, refuses to supply him with gas, giving a different reason for such refusal, it thereby waives its right to such written application, and the fact that such application was oral, is no defence to an action for refusing to supply: *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 539. The company may also require applicants to sign its reasonable regulations: *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 546.

Inspection.—The company may reserve to itself the right to inspect meters, &c., at stated periods and with notice, but it cannot reserve the right to do so at all times and without notice: *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 549.

Fraud on Company, Connecting Pipes, &c., Unreasonable Regulations.—A regulation that after the admission of gas into a person's fittings, they must not be disconnected or opened, either for alteration or repairs or extensions without a

permit from the company, which may be obtained at their office free of expense; and that any gas-fitter or other person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby is illegal and void: *Shepard v. Milwaukee G. L. Co.*, 6 Wis. 549.

A gas company may reserve the right at any time to cut off communication of the service, if it be necessary so to do to protect the works against abuse or fraud, but cannot assume to itself the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, and of its own mere notion. It must resort to the same tribunals upon like process, for protection against fraud, as the law provides for individuals: *Shepard v. Mil. G. L. Co.*, 6 Wis. 549.

Supplying the Public with Water—Public use.—A town was presented with an ornamental fountain, provided with a trough or basin, which was set up in one of the public streets, and supplied with water on public market days *for the use of cattle in the market, and for horses if yoked when passing to and fro*: *Held*, that even if the fountain were a public nuisance, an inhabitant of the town would have no right to use it otherwise than as directed, for example, he would have no right in order to save the expense of water at his stables, to bring his horses to the basin to drink: *Hildreth v. Adamson*, 8 C. B. (N. S.) 587. All persons of the public must, however, be supplied equally. A supply cannot be given to one of a class, and denied to others,

In *Lumbard v. Stearns*, 4 Cush. 62, Chief Justice SHAW speaking of the suggestion made as to the charter of a water company that there being no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms, the company may act capriciously and oppressively; and that by furnishing some houses and lots and refusing

a supply to others, it may thus give a value to some lots and deny it to others, said: "This would be a plain abuse of their franchise. By accepting the act of incorporation they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty, by misfeasance or non-feasance, and the law has provided no other specific punishment for the breach, an indictment will lie.

Perhaps also in a suitable case a process to revoke and annul the franchise might be maintained:" *Lumbard v. Stearns*, 4 Cush. 62. Failure to supply the public without unreasonable delay may make the company liable in damages, or to a penalty provided by statute: *Bedding v. Imperial Gaslight Co.*, 7 Gas J. 814: *Commercial Gas Co. v. Scott*, L. R., 10 Q. B. 400.

ADELBERT HAMILTON.

Supreme Court of South Carolina.

GRIFFITH, ADMINISTRATOR, v. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

An administrator has no such property in the body of a decedent as will enable him to recover damages for its mutilation through the negligence of a railroad.

Semble: He may, however, recover damages in such case for the destruction of the apparel on such body.

APPEAL from Circuit Court.

The opinion of the court was delivered by

SIMPSON, C. J.—This action was brought by the plaintiff, appellant, as administrator of W. Scott Hook, deceased, to recover damages for the mutilation of the dead body of the intestate, and the destruction of the apparel in which it was clad, and of a silver watch at the time on the person of the deceased; all of which is alleged to have occurred by the gross negligence of the defendant company in running a train of cars over said dead body three several times. The defence denied negligence and claimed that the complaint did not state facts sufficient to constitute a cause of action. The whole issue was by consent referred to a special referee, to hear and determine the same.

The referee found as matter of law that the action by the administrator could be sustained. As matter of fact, that the mutilation of the dead body, and the destruction of the wearing apparel resulted from the careless and negligent action of the defendant, and that the amount of the recovery was not limited to the value of the clothing, \$30, and he found for the plaintiff \$10,000 damages.

The decision of the referee was reversed by his honor, Judge

ALDRICH, upon exceptions, who finding that the alleged negligence by defendant had not been proved, and that the plaintiff could not maintain the action, as administrator, because he had no property in the dead body of his intestate, dismissed the complaint. The plaintiff appealed.

(Here follows a discussion of certain questions of procedure which is omitted as not of general interest.)

Apart from the question of procedure, the appellant contends that there is such property or interest in the dead body of a human being as to sustain an action for its wilful or negligent mutilation, and that the right of action in such cases belongs to the administrator of the deceased.

This proposition raises three questions as applicable to the case at bar. 1st. What is meant by the term property? 2d. Can this property attach to the dead body of a human being? And 3d. If so, does it belong to the administrator?

The term "property" may be defined to be, the interest which can be acquired in external objects or things. The things themselves are not in a true sense property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which according to law may be acquired in them, or over them.

This interest may be absolute, or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own use, in exclusion of all others. It is limited or qualified when the control acquired falls short of the absolute, which may be the case sometimes for several reasons not necessary to be adverted to here.

Now to entitle one to bring action for an injury to any specific object or thing, he must have a property therein, of the one kind or the other mentioned. If he has no such property, he can have no cause of action, however flagrant or reprehensible the act complained of may be.

Can property either absolute or qualified be acquired in a corpse, and especially as involved in the case under investigation can such property be acquired by the administrator of the deceased?

As to absolute property, Mr. Blackstone says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes:" 2 Blackst. Com. 429. In Jacobs's Digest, it is said: "A dead body by law

belongs to no one, and is therefore under the protection of the public."

Mr. Bishop said: "There can be no property in a person deceased, consequently larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud:" Bishop Crim. Law 792, citing East P. C. 652; Hawkins and Hale P. C.

Mr. Wharton says: *Corpus humanum non recepit estimationem*: Wharton 228. Lord COKE said: The "burial of the cadaver nullius in bonis.—*Carodata vermitis*: Flesh given to the worms."

Mr. Blackstone said again: "That is the case of stealing a shroud out of the grave which is the property of those whoever they may be, that buried the deceased, but stealing the corpse itself, which has no owner (though a great indecency) is no felony unless some grave clothes be stolen with it: 4 Blackstone Com. 235.

These are strong expressions from leading and distinguished authors all tersely conveying the same doctrine and concurring to the full. We have been referred to no case by appellant, in conflict with this doctrine, nor have we been able ourselves to find a case, or a single expression in any text-book, which affects it in the slightest degree. And that this should be so, is not surprising. Because while it is natural, that we should all feel that the remains of ancestors, and of loved ones should be tenderly watched, and their decent interment carefully guarded, and the mutilation of their dead bodies, and the disturbance of their sepulchre severely punished, and while all laws necessary to that end should be passed, and strictly and sternly enforced, yet even for this purpose, to make such venerated remains the absolute property of any one, in the sense of objective appropriation, would be abhorrent to every impulse and feeling of our natures.

It is true, it is said, that in some portions of Europe during the middle ages, the law allowed a creditor to seize the dead body of his debtor, and in ancient Egypt the corpse of the father might be hypothecated by the son, in order to borrow money. But these were in barbarous and heathenish times, and such ideas have no existence now in any portion of the globe. On the contrary, wherever civilization at least dawned or has commenced to throw even a flickering light upon the people, reverence for the dead has become a universal and a most sacred sentiment; one which would revolt at the idea of their remains becoming property, much less

property in the sense of being appraised and placed upon the inventory of the administrator, subject to the payment of debts and to distribution among the next of kin, which would be required by the law of this state, if such remains could be regarded as property and on that account passing to the administrator. But can there not be a qualified property in the dead, one which gives control to some one with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead? And that when the life escapes, the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound, in life by the tenderest of ties, can invoke the aid of no court in preventing its mutilation, and must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition.

And yet such seems to be the fact, at least the matter is left in great doubt, so far as our limited examination of the cases both in this country and in England, amid the press of our duties, has enabled us to ascertain. Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered. His entire authority is derived from the act, by virtue of which his letters have been granted to him, and that gives him charge only of the "goods and chattels, rights and credits," which were of the deceased. The body of the intestate belongs to neither of these classes, and there is, therefore, no law for him to take it in charge. True he is required to pay as the first of debts, the funeral expenses, but it would be a violent assumption to conclude on that account, that he becomes the legal custodian of the remains, or even if he should, it could only be so, as to the funeral and burial, because the expenses extend no further, they stop at the grave. The question would then arise who could legally protect beyond that point, and in whose behalf could the law be invoked to redress an invasion of the tomb.

We have looked diligently through the common law reports of England and have found no case, in which the civil courts have been appealed to in matters connected with the bodies of the dead. On the contrary, their burial, the grave-yards and cemeteries in which they are interred and the religious ceremonies observed have

been left exclusively to ecclesiastical cognisance ; the civil courts universally holding, in the language of Lord COKE, " that the burial of the cadover is *nullius in bonis*." In some of the states upon this continent, especially in Rhode Island, in Pennsylvania, and New York, the courts, endeavoring to escape from this reproach, have held in general terms that the corpse belongs, not to the administrator but to the next of kin, and that is as far as the cases referred to by appellant's counsel seem to go. In the case of *Pierce v. The Swan Point Cemetery Co.*, 10 R. I. 227, it was held that while a dead body is not property in the strict sense of the common law, it is quasi property over which the relatives of the deceased have rights which the courts will protect.

In the case of *In re Widening Beekman Street*, 4 Bradf. 503, it was held, that the right to bury the corpse and to preserve its remains is a legal right which the courts will protect. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin." In *Bogert v. City of Indianapolis*, 13 Ind. 135, it was held, that the bodies of the dead belong to the surviving relations in the order of inheritance, as property. In *Wynkoop v. Wynkoop*, 42 Penn. St. 293, it was held that a wife has no right or control over the body of her husband, deceased, after burial. The disposition of the remains of the deceased belongs thereafter exclusively to his next of kin;" that though it was her duty to bury the body, as widow after interment her right ended. Upon what authority or established principle of the common law these decisions were founded, even to the extent of legalizing the right of the nearest of kin, does not fully appear, but they afford no support to the position that the administrator has any control whatever, which is the question here. We have no case in our own reports upon the subject, certainly no case bearing upon the precise point before us, i. e. the rights of the administrator. In the absence of all authority, and looking at the act, which authorizes administration, and defines the duties and powers of administrators and describes the property which by operation of law becomes his, we are constrained to the conclusion, that so far as this action is founded upon the mutilation of the deceased by the defendant company, whether accidental, wilful, or negligent, it cannot be sustained by the plaintiff, and that his honor, the circuit judge was correct in so holding.

This, however, does not apply to the clothes in which the body

was clad, and the silver watch upon the person. As to these the administrator was the legal owner, and his appointment, though made after the occurrence, reached to the death, his title commencing at the time. As to these then the action was maintainable, and we think that his honor was in error in not so holding: *McLain's Admr. v. Elden*, Brev. Mass. Rep.; *Dealy v. Lance*, 2 Speer 485.

But the majority of this court having in the case of *Henry A. Meetze v. The C. C. & A. Railroad*, determined that the circuit judge had the power to review and reverse the findings of fact of the referee, and he having exercised that power in this case; the judgment of this court therefore is that the judgment of the Circuit Court be affirmed.

MCIVER, A. J., and MCGOWAN, A. J., concur.

The law as to the rights of living persons over the bodies of deceased human beings will be considered under the following heads:

First.—Is there any obligation resting upon society to bury the bodies of deceased persons, and if there is, who is bound by law to bury the bodies of dead persons?

Second.—Can there be property in a dead body, and how far can it be disposed of by will?

Third.—If there is any obligation to bury the bodies of deceased persons have those on whom the obligation is cast a right to order post-mortems or dissection?

Fourth.—If they who are obliged to bury have the right of ordering post-mortems and dissection, are they bound to bury the body after the post-mortem or dissection, or can they dispose of it in any way that is not a nuisance to others?

First.—Considerations of public policy demand that the bodies of persons deceased must be disposed of so that they shall not become public nuisances. In the leading case of *Queen v. Stewart*, 12 A. & E. 773, which arose on an attempt by the officers of a private hospital to compel the overseers of the par-

ish to bury the body of a deceased pauper who died within the walls of the hospital, it was decided that there was a common-law right to Christian burial existing in favor of all persons not within certain ecclesiastical prohibitions. Lord DENMAN in delivering the judgment of the court in that case said: "Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial, and that implies the right to be carried from the place where his body lies to the parish cemetery."

The cases have laid down no rule as to what constitutes Christian burial; but in England where there is an established church the significance of such words is greater than in the United States. The American authorities all uphold the doctrine of *Queen v. Stewart*; but in America, where the nature of our institutions prevents the existence of any ecclesiastical prohibitions, the right to burial must be general.

A dead man can of course have no rights, and the so-called right to burial is consequently an obligation to bury, which is imposed for the benefit of society at large and not for the benefit of any individual upon certain living persons

hereafter mentioned; and the grounds for its imposition and enforcement is public health and decency: *Queen v. Stewart*, *supra*; *Wynkoop v. Wynkoop*, 42 Penn. St. 293.

The principal inquiry is on whom is this obligation of burying deceased persons cast?

An executor or administrator must bury the body of his deceased testator or intestate: *Williams v. Williams*, L. R., 20 Ch. Div. 659; s. c. 21 Am. L. Reg. 508; *Williams on Executors*, 7th ed., p. 968; *Wynkoop v. Wynkoop*, *supra*; 2 Black. Com. 508.

In *Wynkoop v. Wynkoop*, the court said: "The executor or administrator must bury the deceased in a manner suitable to the estate he leaves behind him and such funeral expenses are placed by an Act of Assembly, in the first class of preferred debts."

It is also held to be the duty, and hence the right of the husband or wife to bury the deceased consort: *Weld v. Walker*, 130 Mass. 422; *Jenkins v. Tucker*, 1 H. Bl. 90. A parent must bury his deceased child: *Reg. v. Vann*, 2 Denison's Cr. Cas. 325.

In this case it appeared that the defendant was entirely destitute; he had been offered a loan of money, for the purpose of burying his child which he declined to receive on the terms offered. The child's body remaining unburied became a nuisance for which the father was indicted. The judge told the jury that he was bound to provide for the burial of his child, if he could obtain the means for the purpose lawfully, and that poverty did not excuse him from the liability for the nuisance caused by the body remaining uninterred, as he was bound to receive the money; but on a case reserved this direction was held to be wrong and Lord CAMPBELL, in delivering the unanimous judgment of the court said: "A man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable

to be indicted for a nuisance for not burying his child, if he has not the means of providing burial for it. He cannot sell the body, put it in a hole, or throw it into a river; but unless he has the means of giving the body Christian burial, he is not liable to be indicted, even though a nuisance may be occasioned by leaving the body unburied."

This defence would, it seems, extend to every case of the obligation to bury, and the law would excuse performance of this involuntary duty where the person bound has no means for its fulfilment. The law however puts the burden of burial where there are no executors, administrators or relatives, upon the householder in whose house the person dies: *Queen v. Stewart*, *supra*, where upon this point Lord DENMAN said: "It should seem, that individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot, therefore, cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry him uncovered to the grave." This language is adopted in the judgment of the court in *Wynkoop v. Wynkoop*, *supra*.

The householder may be said to be the person ultimately bound in every case, and where there are others primarily bound who have no means of fulfilling the obligation, it is submitted that he is liable just as though these persons did not exist.

The liability of the householder cannot be explained upon the theory that if the body were not buried, a nuisance would result, for he cannot throw the body into a hole upon his property and cover it up, which would prevent a nuisance resulting, but he must carry it to the grave decently covered: *Queen v. Stewart*, *supra*. This shows that the obligation is a positive one, requiring active duties, and not a mere negative one, like the prevention of perishable elements becoming objectionable by the process of decay.

It is useless to speculate as to what the courts will consider too remote a relationship to create the obligation of burying a deceased relative, but it may be assumed that only persons that can be considered very near in blood or tie, would be held liable for the performance of the duty.

It may be remarked that the question here considered is at common law; and statutes have been passed in nearly all jurisdictions which provide for the burial or disposition at the public expense, of the bodies of those persons, whether destitute or not, who leave no friends or kindred willing to perform the office. It is interesting to note that in the case of *Queen v. Stewart*, the court refused to extend the operation of the statute of 43 Eliz. c. 2, which provided for the relief of the poor while living so as to include the burial of the deceased paupers not dying in the parish house; and the court said: "It will probably be found, therefore that when a pauper dies in any parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, the duty to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law." See also *Directors of Poor v. Wallace*, 8 W. & S. 94; where it would seem that the court in construing the Pennsylvania Act of April 13th 1836, which is a similar statute to 43 Eliz., adopted the very construction that the court in *Queen v. Stewart* thought unwarrantable.

The consequence of a refusal to fulfil any obligation to bury a deceased person where the person bound has the means for the purpose will make the offender liable for a nuisance if any inconvenience results to the public: *Reg. v. Vann*, *supra*, see also *Andrews v. Cawthorne*, Willes 537 note a, which is a note of a case decided by ABNEY, J., on a question as to burial fees. This language however occurs in the decision: "And the burial of the dead is (I apprehend) the clear duty of any parochial priest and minister;

and if he neglect or refuse to perform the office, he may by the express terms of the canon 68 be suspended by the ordinary for three months. *And if any temporal inconvenience arise as a nuisance from the neglect of interment of the dead corpse, he is punishable by the temporal courts by indictment or information."*

In answer to the first question it may be said that there exists an obligation of burying deceased persons which is imposed primarily on executors, administrators, and certain kindred, and ultimately upon the householder in whose house the person died. Whether cremation is a fulfilment of this obligation or not, will be discussed in the reply to the fourth question.

Second.—That there can be no *property* in a dead body after burial is a settled principle of law. In 2 Black. Com. 429 the learned commentator says, "But though the heir has a property in the ornaments or escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least if not impiously violate and disturb their remains when dead and buried. The person indeed who has the freehold of the soil may bring an action of trespass against such as dig and disturb it; and if any one taking up a dead body steals the shroud or other apparel it will be felony; for the property therefor remains in the executor, or whoever was at the charge of the funeral."

This principle was law in Lord Coke's time, see 3 Coke's Inst. 203, and modern cases affirm the doctrine; see *Reg. v. Sharpe*, 7 Cox Cr. Cas. 214; *Williams v. Williams*, L. R., 20 Ch. Div. 659; (s. c. 21 Am. L. Reg. (N. S.) 508, with note by Judge EWELL; *Weld v. Walker*, 130 Mass. 422.

In the passage cited from Blackstone there is no reference to the stealing of a body being a crime, and in his 4th Book at 239, he says expressly that the act is not a felony, though highly indecent.

The stealing of the shroud alone is mentioned as criminal. It would seem therefore, that the shroud does not become realty when deposited in the grave, because if it did, the offence of taking it away would only be a trespass.

The fact that there is no property in a corpse, as Blackstone says, prevents the carrying of one away from being a felony, such an act, however, is a misdemeanor even at the common law: *King v. Lynn*, 2 T. R. 733. This was an indictment for taking up a body for the purpose of dissection, and after conviction for the offence, it was urged in arrest of judgment, that if the offence was a crime at all, it was cognizable only in the ecclesiastical courts; but the court said, "that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court, as being highly indecent and *contra bonos mores*, at the bare idea of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence."

Though there is no property in a corpse after burial, there is recognised in England the right of the executor or administrator to the possession of a body before burial: *Reg. v. Fox*, 2 Q. B. 246. In this case a jailor sought to retain the body of a deceased prisoner until certain debts were paid. The court, by mandamus, compelled the jailor to deliver the body to the executors. When it is considered that the body was in the possession of an officer of the court, the case has no strength as an authority for the proposition that there is property in a corpse before burial; there was only recognised a right to possession for the purpose of interment. See *Williams v. the Williams*, *supra*, at p. 665. In America courts recognise even after burial a quasi right of property in dead bodies, but in the case of *Bogert v. Indianapolis*, 13 Ind. 134, which involved the question of the violation of a cemetery ordinance,

the following doctrine was laid down by *PRANKINS, J.*: "The bodies of the dead belong to the surviving relations in the order of inheritance, as property, and they have the right to dispose of them as such, with restrictions analogous to those by which the disposition of other property may be regulated. They cannot be permitted to create a nuisance by them. We doubt if the burial of the dead can as a general proposition be taken out of the hands of the relatives thereof, they being able and willing to bury the same."

The logical outcome of this doctrine, which is antagonistic to the other American cases, would be to vest the title to dead bodies, where there are no relatives, in the state, as the successor to all unclaimed property. The other American cases do not go further than to recognise a quasi property in certain relatives for the purpose of changing the place of burial.

The right in the husband was recognised in *Weld v. Walker*, 130 Mass. 422. See also *Fox v. Gordon*, 11 W. N. C. (Pa.) 302. In *Wynkoop v. Wynkoop*, *supra*, a bill was filed by a widow against the next of kin of her husband to obtain the removal of the body of her husband to another cemetery. She claimed the right in her capacity as administrator and as the widow. The court decided that in the first capacity all rights of control over the body ceased at burial, and that as widow she had no right to remove the body against the wishes of the next of kin.

The suit in *Weld v. Walker*, was not brought against the next of kin of the wife, but against the owners of the grave, who were related to the deceased wife by marriage. The court laid stress on the fact that the husband had not freely consented to the burial of the wife's body in the grave with the intention that it should be the last resting place.

The third conclusion in *S. B. Baggles's Report*, in 4 Bradford Surrogate

Reports 503, is to the effect that the right to bury a corpse and preserve its remains belongs exclusively to the next of kin, in the absence of testamentary disposition. This conclusion was cited with approval in *Wynkoop v. Wynkoop*, and the decisions warrant the assertion that the prima facie right to control the disposition of dead bodies after burial is in the next of kin.

Where the next of kin disagree the court will not permit removal at instance of some against the wishes of others: *Lowry v. Pitt*, 2 W. N. C. (Pa.) 675. The court in this case considered that as the deceased had selected his grave there was an additional reason for not interfering.

Conclusion 4, of Mr. Ruggles's report, above cited, is "that the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure."

It would seem, however, that the recognition of this right is discretionary with the court, and that at least a good reason for removal must be shown.

In *Secor's Case*, 31 Leg. Int. 268, the widow having interred the body of her deceased husband, the son claimed the right to remove under instructions from his deceased father. The court however restrained him from so doing, and this language was used in the decision: "A proper respect for the dead, a regard for the sensibilities of the living, and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place except under extreme circumstances of exigency."

The courts of equity have jurisdiction over controversies relating to the removal of dead bodies, and to that forum is assigned the protection of graves: *Weld v. Walker*, *supra*. The courts of equity in America in the opinion of Mr. Justice GRAY have a jurisdiction in this respect similar to that possessed by the ecclesiastical courts of England.

In *Beatty v. Ritchie*, 2 Peters 566, Mr. Justice STORY, alluding to the attempt of certain heirs to get possession of a lot of ground dedicated by their ancestor for burial purposes and used for these purposes for many years, said, at p. 584: "This is not the case of a mere private trespass; but a public nuisance; going to the irreparable injury of the Georgetown congregation of Lutherans. The property consecrated to their use by a perpetual servitude or easement, is to be taken from them; the sepulchres of the dead are to be violated; the feelings of religion, and the sentiment of natural affection of the kindred and friends of the deceased are to be wounded: and the memorials erected by piety or love, to the memory of the good, are to be removed, so as to leave no trace of the last home of their ancestry to those who may visit the spot in future generations. It cannot be that such acts are to be redressed by the ordinary process of law. The remedy must be sought, if at all, in the protecting power of a court of chancery; operating by its injunction to preserve the repose of the ashes of the dead, and the religious sensibilities of the living."

See also *In re Stephen Girard*, 4 Am. Law Jour. (N. S.) p. 97, where the court took the view that a court of equity was the proper forum for the settlement of controversies concerning the removal of dead bodies after burial.

In 6 Am. Law Rev. 182, there is a report of an Ohio case (which is not contained in the regular reports), which held that the custody over a body before burial was a quasi right of property, the violation of which was the basis of an action in the nature of a tort. The case was one where the defendants, a body of physicians, obtained permission to dissect a part of a body, promising to give the body burial after the dissection. They broke this agreement, putting timbers and straw into a box and sending this as the body to a cemetery for interment, pre-

viously holding funeral services over the rubbish. The fraud was discovered and the body found half naked in a dissecting room of a medical college. The action was brought by the husband, averring damages for laceration of feelings. One count sounded in tort, and was chiefly based on fraud. There were other counts based on the violation of the agreement. There was a demurrer to the first count, and it was contended for the defence that there was no action in any one for an injury to a corpse, there being no property in the subject-matter. PRENTISS, J., overruled the demurrer and said: "The law gives the husband the right to the custody of the dead body of his wife, a parent of a child and a child of a parent. But it would be useless to give this right if the husband is not protected in its exercise. There is in this state no statute making it a criminal act to interfere with this right. The remedy, if there is any, must be by a civil action. It would be idle to say that the husband has a right to protect his wife's dead body from insult and to its care and custody for the purpose of burying it, if he has no means to protect and enforce the right. A body itself may not be property; but this right may be called perhaps a quasi property. At any rate it is a right which the law will enforce, and for an infringement of which an action will lie."

The judge concluded his decision with these forcible words: "The old English decisions referred to by the defendant only establish that a body is not property. They do not show that there may not be rights attached to a dead body, rights to care for it, watch over it, and bury it, which the law will protect. If they did hold that no such rights existed, in this age and in this country, the court would feel it its duty to disregard them."

There is no power to dispose of one's body by will. The case of *Williams v. Williams*, *supra*, is authority for this proposition. In that case the testator gave

his body to a lady who was not his executrix, having previously given her certain directions by letter as to its cremation. He directed the executors by his will to pay the expense of the disposal. The relatives would not consent to having the body burned, and obtaining the consent of the executrix buried it. Subsequently the lady obtained a license to remove the remains to another cemetery, and upon this authority removed the body, cremated it and then sued the executors for the expenses. The court held that the cremation under the pretence of removing of the body was a fraud on the license, which itself prevented her recovering for her expenses; but the court, KAY, J., delivering the opinion, held that the bequest of the body was of no effect: "It follows from these cases (*Reg. v. Sharpe*, *Reg. v. Fox*) that a man cannot dispose of his body by will. I asked whether there was any authority contrary to that, and I have been referred to none. Accordingly, the direction in the codicil that the testator's body was to be delivered to the plaintiff, who is not an executrix, is bad in law and void. She had no property in the body, and could not have enforced delivery of it to her."

This is conclusive of the question, and when we consider that property in a dead body can only begin when the living body becomes inanimate, i. e., at the moment of death, it follows that property in one's own body can never arise.

Can a man order the particular mode of disposition of his body? This depends on whether his wishes are binding upon the person bound to bury his remains! It is difficult to see how any mere request could be made binding upon the custodian unless he received money from the testator for the purpose of such disposition, for the common-law right is to burial, and to burial alone, and not to any mode that the fancy of the person dying should suggest. A man cannot bequeath his body, and to direct any

mode of disposal is an exercise of control over it just as if it were property, and consequently subject to the same objection as a bequest of the body itself.

A trust for the purpose of some peculiar disposition could only be effective where the trustee was the executor or legal custodian of the body, because only the executor or custodian of the body has a right to possession of the corpse before burial: *Williams v. Williams, supra*. Such a trust is analogous to a trust to keep tombstones in repair; there being no *cestui que trust*; the object for which the money is applied is left to the conscience of the quasi trustee. Such a trust cannot be sustained as a charity, the purpose of the trust being entirely selfish. See Bishop on Equity, 2d ed., p. 168. If however property is given with a charge to keep tombstones or graves in repair, and for other purposes, the courts disregard the charge for the purpose of keeping the graves or tombstones in repair, treating it as invalid, but apply the whole to the valid trusts: *Fisk v. Attorney General*, L. R., 4 Eq. 521; *Dawson v. Small*, L. R., 18 Eq. 114.

In *Dawson v. Small*, there was a gift to a trustee of a certain amount of property, the income of which was to be applied to keeping certain tombstones in repair, including that to be erected over the testator, the residue left after this purpose was effected was to be given to poor persons over fifty years of age who were members of a certain religious society.

Vice-Ch. BACON, in delivering the opinion of the court, at p. 118, speaking of the obligation to keep the grave in repair, said: The obligation, if it may be so called is discharged. It is an obligation either to be performed or not as the persons to whom the custody of the money is given, think fit, and all that is yielded from the annual income of the devised estates, goes therefore to the charitable purposes which the testator has pointed out. The obligation to keep up

the tombstones is merely honorary: but the obligation to give all that is not applied for the purposes first mentioned in favor of these poor people, is by no means honorary; it is a trust that must be executed."

In the case of *Pierce v. Swan Point Cemetery*, 10 R. I. 227, at p. 239, this passage occurs: "Most persons look forward to the proper disposition of their remains, and it is natural that they should feel anxiety on the subject. And the right of a person to provide by will for the disposition of his body has been generally recognised. We have already seen that by the canon law, a person has the right to direct his place of sepulture."

It will be seen, however, from the authorities we have just been considering that they do not warrant the statement of the learned judge, and it is submitted that the probable meaning of the judge's words may be that popular feeling is in favor of the existence of this right.

The present state of the law warrants the assertion, that a body cannot be disposed of by will as a gift, nor can any particular mode of disposition which shall bind the executor, be provided for effectively; a gift upon condition that a certain mode of disposition be made, would be like any other gift or condition. (See *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255, which was a gift of an annuity on condition that a tomb was kept in repair.) Such a gift would have to be made to a person like an executor who alone would have control of the body after death (*Williams v. Williams*) to have any chance of being effective, and even then the will of the donee, and not that of the donor, would determine whether the body should be disposed of as desired or not for the gift would only be an inducement for the donee to comply with the wishes of the deceased; his refusal to accept the terms of the gift would destroy the effectiveness of this attempt to secure a certain kind of disposition. The disposi-

tion asked for must of course be a legal one, i. e., it must not be against public policy.

Third.—Upon the point raised by the third question, there is absolutely no authority. We must find an answer in the analogies furnished by the authorities. Those who have the obligation of burying a body have the right to the custody of it for that purpose; now have they any further rights? A post-mortem is for the purpose of setting aside all uncertainty as to the mode of death. This is something that the policy of the law favors, and a custodian of a body, it is thought would be allowed to order one to be made. Dissection differs from a post-mortem; it is an experimental operation for scientific purposes, beneficial as such, and the policy of the law is not against the practice. Now can a custodian of a body order a dissection to be made. This will depend on whether in so doing he violates his obligation to bury the body or oversteps in any way the rights conferred on him by law as custodian. In *Queen v. Price*, 21 Am. L. Reg. 560, at p. 565, Mr. Justice STEPHEN says, that the practice of anatomy is lawful, but at page 564 speaking of a statute making it lawful for executors or persons having lawful possession of bodies to deliver up the bodies for dissection, except in certain cases, he says it is inconsistent with the theory that there is an absolute duty on persons having charge of dead bodies to bury them; but it is submitted that the courts never have laid down that this obligation was anything except to ultimately dispose of the body by burial, and all acts antecedent to interment which do not violate the criminal or civil laws as to the rights of the custodian would always have been permitted.

The mere fact that a custodian has rights over a body even for the purpose of burial leads to the conclusion that there is a quasi property in it. In *Pierce v. Swan Point Cemetery*, PORTER, J., after coming to the conclusion that there was quasi property in a body

said: "but the person having charge of it cannot be said to be the owner in any sense whatever: he holds it as the sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, &c." Upon the theory of this case, the control of a custodian depends on the consent of the relatives of the deceased, but the only case which the court intimated would furnish ground for interference was preventing the relatives from visiting a grave for the purpose of testifying their respect to the deceased. The principle of the case is broad enough however to warrant the court's interference to prevent dissection, and whether it be put upon the ground indicated in *Pierce v. The Cemetery*, *supra*, or upon the general exercise of a court's discretion in the matter of burial it is thought that the courts would interfere to prevent the practice of dissection, by injunction, where relatives of the deceased near enough in blood objected. The court in so doing would recognise the popular prejudice against the practice, on the ground that permitting the operation might injure the sensibilities of the living.

These sensibilities would perhaps not be considered if it was the wish of the deceased that the operation was to be performed. This is not inconsistent with what has been previously said, for though the deceased has no absolute right to order the disposition of his body, his wishes may render the exercise of the custodian's discretion valid and so prevent the interference of relatives. If there were no relatives, of a sufficiently near degree, the ground for invoking the aid of the court falls.

Fourth.—The probable origin of the common-law obligation of burial is to be found in the parochial system of England. See *Pierce v. Swan Point Cemetery*, *supra*. That system recognised the right of every parishioner to burial in the parish church yard.

The common-law obligation to bury does not depend on the law of expediency alone, for the obligation is not only to prevent a nuisance by burying the body, but to bury decently *i. e.*, as the courts hold, with a shroud : *Gilbert v. Buzzard*, 2 Hag. Con. Rep. 333 ; *Queen v. Stewart*, *supra*. The law of expediency would sanction any form of disposition that secures public health, but the sentiment which surrounds the disposal of the dead demands some ceremonious form of disposition.

The case of *Bogert v. Indianapolis*, *supra*, is contrary to this proposition, for the court in holding that the bodies of deceased persons were property, held consistently that the dispositions of such bodies was to be regulated only by rules in regard to all property. The court said : " The relatives have the right to dispose of dead bodies of their deceased relatives as property within restrictions analogous to those by which the disposition of other property is regulated. They cannot be permitted to create a nuisance by them."

For sanitary purposes alone a body could be reduced to ashes by quicklime or acids, but that any such form could be a fulfilment of a religious duty, such as the obligation to burial was in its origin, and which character it is thought it still retains, is impossible. In *Williams v. Williams*, the court in speaking of the directions of the deceased for the cremation of his body said : The purpose named in the letter cannot make the gift either better or worse, but it was confessedly for cremation, and a question might arise whether that was legal—according to the law of this country. That question, however, I shall not decide."

The question arose directly in *Queen v. Price*, above cited, where upon an indictment for burning the body of his child instead of burying it, the defendant was acquitted. It appeared that the prisoner whose child died, took the body out upon a vacant lot, and putting it into a cask of

petroleum set fire to it ; a crowd collected and some one put the fire out, and had the father arrested and taken before the magistrate, who committed him. The charge of STEPHEN, J., before the grand jury which indicted him contains many remarkable statements as to the law. In reviewing the case of *Williams v. Williams*, the judge took occasion to say, (page 567) : " The question arises in the present case in a perfectly clear and simple form, unembarrassed by any such consideration as applies to the other cases to which I have referred. There is no question here of the illegality and dishonesty which marked the conduct of those that were described as resurrection-men, nor of the artifices, not indeed criminal, but certainly disingenuous, by which possession of the body was obtained in the case of *Reg. v. Sharpe and Williams v. Williams*. Price had lawful possession of the child's body, and it was not only his right but his duty to dispose of it by burying, or in any other manner not in itself illegal. Hence I must consider the question, whether to burn a dead body instead of burying it is in itself an illegal act.

" After full consideration, I am of opinion that a person who burns instead of burying a dead body does not commit a criminal act, unless he does it in such a manner as to amount to a public nuisance at common law. My reason for this opinion is, that upon the fullest examination of the authorities, I have, as the preceding review of them shows, been unable to discover any authority for the proposition that it is a misdemeanor to burn a dead body, and in the absence of such authority I feel that I have no right to declare it to be one.

" There are some instances no doubt in which courts of justice have declared acts to be misdemeanors, which had never previously been decided to be so, but I think it will be found that in every such case the act involved great public mischief or moral scandal. It is not my

place to offer any opinion on the comparative merits of burning and burying corpses, but before I could hold that it must be a misdemeanor to burn a dead body, I must be satisfied not only that some people, or even that many people object to the practice, but that it is on plain undeniable grounds, highly mischievous or grossly scandalous."

The learned judge continued (p. 568.)

"There are, no doubt, religious convictions and feelings connected with the subject which every one would wish to treat with respect and tenderness, and I suppose there is no doubt that as a matter of historical fact, the disuse of burning bodies was due to the force of those sentiments. I do not think, however, that it can be said, that every practice that startles and jars upon the religious sentiments of the population, is for that reason a misdemeanor at common law. The statement of such a proposition, in plain words, is a sufficient refutation of it, but nothing short of this will support the conclusion that to burn a dead body must be a misdemeanor. As to the public interest in the matter, burning, on one hand, effectually prevents the bodies of the dead from poisoning the living. On the other hand, it might, no doubt, destroy the evidence of the crime. These however, are matters for the legislature and not for me. It may be that it would be well for Parliament to regulate or forbid the burning of bodies, but the great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance upon the strongest reasons."

These eloquent remarks seriously impeach the cases which have declared the existence of a common-law right to burial (understood in the popular sense of the word) and the reasoning goes far towards sustaining any such right on grounds of expediency alone. The weightiest objection to this declaration of the law is that

public policy is very seriously against this mode of disposal, as proper precautions to first determine the mode of death, are not required by positive law. By reducing a body to ashes, crime can easily be hidden. This did not weigh very seriously with the learned judge, who noticed the objection in the course of his opinion, but did not think it of sufficient force to condemn the practice of cremation.

Whether cremation is lawful or not it is the subject of popular prejudice, just as dissection is, and the courts should therefore interfere in favor of relatives to forbid the act unless the deceased has asked for such disposal. As the ground on which the obligation of burial is enforced is public health and public decency the improper disposal of a body cannot be the subject of any claims by relatives in the nature of a civil suit for damages.

The Ohio case cited, though contrary to this, loses much of its strength when it is considered that there was no law in the state making such an act criminal. The court felt the necessity of punishing the misconduct. Any improper dealing with a body either in the mode of disposal or in any indignity put upon it must be an infringement of the common-law right to burial in order to warrant the interference of the law at all and then it is submitted that such acts would probably be criminal.

It may be said that assuming that dissections and post-mortems would be allowed, the common-law right to burial requires that the bodies of the persons should be buried after the dissections or post-mortems. Since the case of *Queen v. Price*, it is very difficult to say exactly what form of disposal would be illegal. The reasoning of the learned judge could have been invoked just as strongly in favor of a reduction to ashes by quicklime as it was in that case in favor of petroleum. The writer can only leave this question in the uncertainty in which the cases leave it. L. V. BARETT.

Philadelphia.

Supreme Court of Wisconsin.

STATE ex REL. BOWE v. BOARD OF EDUCATION OF FOND DU LAC.

A regulation that each scholar, when returning to school after recess, shall bring into the school-room a stick of wood for the fire, is not "needful" for the government, good order and efficiency of the schools, and a scholar cannot be suspended for a refusal to comply with such regulation.

APPEAL from the Circuit Court of Fond du Lac county.

George E. Sutherland, for appellant.

P. H. Martin, for respondent.

The opinion of the court was delivered by

COLB, C. J.—One can but express surprise that any intelligent teacher or intelligent board of education should suffer such a case as this to reach the courts. The fact that it is here can only be accounted for on the ground that either the teacher or the board of education, perhaps both, have sadly misconceived their powers and duties, or have been actuated by some improper motive in excluding the relator's son from the public school. The reasons for excluding him, as stated in the return, are, in substance, that the board of education—which is clothed with power to make rules and regulations for the government and organization of schools, for the reception and instruction of pupils, and for the preservation of good order and discipline in schools—did, long prior to the supposed grievance of the relator, enact certain rules, among which were these: "Rule 27. Any pupil guilty of disobedience to a teacher, or of gross misconduct, may be suspended by the principal." "Rule 29. Any pupil suspended from school by virtue of any one of the foregoing rules can be readmitted only by bringing a written permit from the superintendent."

It is then stated that for many years there had existed in all the schools of the city of Fond du Lac, except the high school, a regulation known and approved by the board, whereby the teachers of the several schools have been authorized to and have required each pupil of sufficient age and bodily strength, upon returning from the play-ground at recess, to bring with him a stick of wood fitted for stove use, to supply the stoves with fuel in the rooms occupied by such pupils, and to keep the rooms warm and comfortable. It is for a refusal of the relator's son to conform to this regulation that he was suspended.

It is further stated that the refusal of the boy was in presence of the scholars of the school, and was without cause other than to cause a breach of the order and direction of the teacher and principal, and in defiance of their authority, and was calculated to bring such authority into contempt, &c. On account of the disobedience of the pupil to conform to this regulation, to sustain his authority over and discipline in the school, the principal and teacher caused the pupil to be suspended, and notices thereof in writing to be given to the relator and superintendent.

In contesting the sufficiency of this return, the learned counsel for the relator insists that the rule or regulation requiring pupils to bring up wood for use in the school-room is unreasonable, and not binding upon any pupil who does not wish to comply with it; that it does not relate to a subject which concerns the education of pupils or discipline in the schools; therefore that the board had no right to adopt and enforce it to the extent of excluding a pupil who did not conform to it. He says our public schools are organized and maintained for the education and improvement of children in learning; that no rule is proper which does not conduce to these ends—that does not in some way promote the good order or government of the schools; secure the decorum and quiet in the school-room which are essential for advantageous instruction and discipline. Consequently any rule or regulation which has for its object anything outside of the instruction of the pupil—the order requisite for instruction—is beyond the province of the board of education to adopt. The requirement that school children should bring up wood, when not by way of punishment or discipline for misconduct, has nothing to do with the education of the child. It is nothing but manual labor, pure and simple, and has no relation to mental development. If a child can be compelled to bring up wood, he can be made to saw and split it before it is brought up; he can be compelled to bring it to the school-yard and throw it in the basement; can be made to clear the sidewalk of snow, wash the windows, or do any other menial work about the school-house and ground. It seems to us difficult to escape the force of this argument.

School boards and boards of education have important duties to discharge, and we have no disposition, as our decisions show (*Morrow v. Wood*, 35 Wis. 59; *State v. Burton*, 45 Id. 150), to circumscribe their powers in too narrow a compass. The statute

clothes them with power to make all needful rules for the government of the schools established within their respective jurisdiction, and to suspend any pupil from the privileges of the school for non-compliance with the rules established by them, or by the teacher with their consent: Section 439, Rev. Stat. subc. 15 (sect. 10, c. 152, Laws 1883, p. 426). While from the necessity of the case much discretion must be left to these boards as to the nature of the rules which are prescribed, yet it cannot fairly be claimed that the boards are uncontrolled in the exercise of their discretion and judgment upon the subject. The rules and regulations made must be reasonable and proper, or, in the language of the statute, "*needful*" for the government, good order, and efficiency of the schools—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects according to their humor or fancy, and make a disobedience of such a rule by a pupil cause for his suspension or expulsion. We therefore think the rule or regulation requiring the pupil to bring up wood for use in the school-room was one which the board had no right to make and enforce.

But if we are wrong in this view, the relation shows a most satisfactory excuse on the part of the boy for failing to conform to it. It is set forth therein that the relator saw the teacher, Mr. Bond, about the 13th of February 1884, and informed him that his son was physically weak, unable to carry up wood, and requested the teacher to excuse the boy from performing that work. Notwithstanding this request the teacher required the boy to bring up wood. Again the relator saw Mr. Bond, explained to him the condition of his son's health, that he had had diphtheria, and had a chronic difficulty in his side, which was aggravated by his carrying up wood, and asked that his son be excused therefrom. Still Mr. Bond insisted that the boy should obey the rule and bring up wood, and directed him to do so. The relator saw Mr. Bond the third time, and informed him that he had instructed his son not to carry up wood, and that if he (Bond) should order him so to do, he must expect the boy to refuse. On the 26th of February 1884, when the teacher again required the boy to bring up wood, the boy told him he could not, under his father's orders. Thereupon the boy was suspended from school. The great forbearance and good

nature manifested by the father in this case are not usual with parents, still they are commendable. One would naturally suppose if "the element of mildness and sweet reasonableness" had been very strongly at work in the spirit of Mr. Bond, he would have yielded to the request of the father, thus three times made. But obedience must be rendered to the rule *ruat cælum*.

This is not a case of a conflict between the authority of the parent and the board or teacher in a matter where such board or teacher has a right to prescribe a rule for the obedience of a pupil. If the case involved that question it would be different. The relator made some efforts to get his son reinstated in school under Rule 29. We shall not notice the steps taken by him for the purpose, holding as we do that the boy was wrongfully suspended in the first instance. A question was made as to whether the relator should not have proceeded against the city superintendent, and not against the board of education. The superintendent is elected by the board, and is under its control: Subchapter 3, § 2, Charter. The board makes the rules for the government of the schools: Subchapter 15, Charter. The board certainly had power to reinstate the relator's son, and it was its duty to do so under the circumstances.

The return is defective in law for the reasons given, and the demurrer to it should have been sustained. The order of the circuit court is therefore reversed, and the cause remanded for further proceedings according to law.

The principal case is certainly one of the most remarkable, if not the most so, of all the cases upon the subject of the relation of teacher and pupil, to be found in the books, and is a remarkable illustration of the stupidity and obstinacy too often found in inferior municipalities. As to the correctness of the decision of the court in this case there is absolutely no doubt whatever. In the case of the *State v. Burton*, 18 Am. L. Reg. (N. S.) 233, decided by the same learned court,

we took occasion to make an exhaustive collection of the reported cases upon the powers and duties of school teachers and school boards, as respects the regulation, correction and restraint of the pupils under their charge. If any authority is necessary beyond the reasoning of the court in the principal case, it may be found there.

MARSHALL D. EWELL.

Chicago.

Supreme Court of California. In Banc.

HART v. WESTERN UNION TELEGRAPH COMPANY.

A regulation by a telegraph company that its liability for errors in, or failure to deliver, a message shall not extend beyond the sum received for sending it, unless the message is repeated, for which service an additional price is charged, is reasonable and binding on the sender.

Under the California Code telegraph companies are not common carriers, and in an action against them for the erroneous transmission of a message the burden is on the plaintiff to show that the loss was occasioned by wilful misconduct or gross negligence on the part of the company.

The judgment of the court in department, reported *ante*, page 320, reversed.

THORNTON and McKEE, JJ., dissent.

THE facts of this case when before three of the judges in department are reported, *ante*, page 320, where the opinion there delivered is printed in full. Upon consideration by the court in banc the judgment delivered in department was reversed, the following opinions being delivered.

ROSS, J.—Further consideration has convinced us that some of the views should be modified, and the rulings in some respects changed. The case as expressed when this case was considered in department should be this :

On the 15th day of December 1882, the plaintiff delivered to the defendant, at its Stockton office, this message :

“GEORGE W. MCNEAR, San Francisco: Buy bail barley falun; report by mail. GEORGE HART.”

The message was promptly transmitted and delivered as written, except that the word “bail” was changed to the word “bain.” By the private cipher code of McNear, used by the plaintiff in the message, the word “bail” means “100 tons,” and the word “bain” means “225 tons.” As the message was delivered it directed McNear to buy for the account of the plaintiff 225 tons of barley, whereas as it was written by the plaintiff, McNear was directed to buy on plaintiff’s account 100 tons only. Acting on the message received, McNear bought for plaintiff 200 tons of barley. When the plaintiff discovered that fact he notified the defendant that 100 tons had been bought in excess of that directed to be bought by the original message, and asked the defendant what he should do with the surplus so purchased? Defendant refused to give any instruction in regard to it. Plaintiff thereupon sold the barley at the highest market rate, his loss on the extra 100 tons being \$429.82. It is for the loss thus sustained by him that the action is brought.

At the trial the only proof given by the plaintiff to show negligence on the part of the defendant was the admitted fact that the message was delivered in its altered form. It was also admitted that the message was written by the plaintiff, upon a printed form prepared by the defendant, underneath the words, “Send the fol-

lowing message, subject to the above terms, which are hereby agreed to," and that among the "above terms" referred to are the following: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages."

That the message in question was not directed to be "repeated" is conceded by the plaintiff, and on the part of the appellant, it is contended that as the message was not repeated, appellant is not responsible in damages beyond the amount received for its transmission, and this because it so declared in the conditions printed at the head of the form upon which the dispatch was written, and to which, as is claimed, the plaintiff assented. In department we held that telegraph companies are exempt only for errors arising from causes beyond their own control. In the first place, this rule would extend the liability of such companies beyond that declared by statute in this state. Originally, sect. 2162 of the Civil Code read, "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein;" and section 2168 of the same code originally read: "Every one who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry." But in 1874 these sections were amended and made to read as follows:

"Section 2162. A carrier of messages for reward must use great care and diligence in the transmission and delivery of passengers.

"Section 2168. Every one who offers to the public to carry persons, property or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

By statute, therefore, a telegraph company in this state is not a common carrier, and the degree of care and diligence exacted of such companies in the transmission and delivery of messages is "great care and diligence." If great care and diligence—which terms of course include the employment of proper instruments and competent operators—be exercised by the company in the transmission and delivery of a message, the degree of care prescribed by the statute is complied with. In the next place, the effect of holding that telegraph companies are exempt only for errors arising from causes beyond their control, would be to hold that such companies cannot, by stipulation, limit their liability to any extent; for since they are not common carriers or insurers, in no event would they be liable for errors arising from causes beyond their own control. With respect to such stipulations the decisions of the courts are very conflicting.

In Illinois, Maine and Wisconsin, it is held that there can be no consideration for such a stipulation on the part of the sender of the message, and, that so far as he is concerned, it is void for that reason, although fully assented to by him: *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; s. c. 74 Id. 168; *Candee v. W. U. Tel. Co.*, 34 Wis. 477; *Bartlett v. W. U. Tel. Co.*, 62 Me. 218. It is further held in these cases that such a stipulation is contrary to public policy, and for that reason, also, is void. On the contrary, the cases are very numerous that hold that a stipulation providing that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half of the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except wilful misconduct or gross negligence on the part of the company: *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *Camp v. W. U. Tel. Co.*, 1 Met. (Ky.) 164; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; *Passmore v. W. U. Tel. Co.*, 78 Penn. St. 138; *Lassiter v. W. U. Tel. Co.*, 89 N. C. 334, and numerous cases collected in the note to the case of *The W. U. Tel. Co. v. Blanchard*, reported in 45 Amer. Rep. p. 486.

There is still another class of cases, of which *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa 433, is one, which maintain that such a stipulation should not be held to exonerate or release the company from damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators. But as this latter class of cases concede that telegraph companies are not common carriers, their liability must rest on the ground of negligence or wilful misconduct, which is fraud. Fraudulent conduct on the part of the company would, of course, vitiate such a stipulation, but to say that no stipulation can be made limiting their liability for negligence, is, to say in effect, that no stipulation can be made limiting their liability at all. It seems to us, therefore, that we must either hold, as did the courts in Illinois, Maine and Wisconsin, that such stipulations are invalid, because unsupported by a consideration and contrary to public policy, or that it is competent for telegraph companies to stipulate for the limitation of their liability for errors arising from any cause except wilful misconduct or gross negligence. As respects the question of consideration, it is enough to say that if the stipulation is one that can be made, it is a part of the contract, and is supported by the same consideration that supports the contract for the transmission and delivery of the message. With respect to the reasonableness of stipulations of the character of that under consideration, we find, upon careful examination, that according to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for, for any cause except wilful misconduct or gross negligence on the part of the company; and we so hold. It would serve no useful purpose to state at length the reasons given by the various courts in support of this conclusion. It is sufficient to say, generally, that they are founded in the peculiar nature of the employment; the extraordinary risks attending it, against many of which human foresight cannot provide; in the fact that the thing—the message—with which the company is intrusted is of no

intrinsic value: that the importance of it cannot be estimated except by the sender; for the transmission of which there must be a simple rate of compensation, and the measure of damages for a failure to transmit or deliver which, has no relation to any value which can be put on the message itself.

The action of the court below, with respect to the instructions, was not in accord with these views. As the case must therefore be sent back for a new trial, it is proper that we should determine upon which party rests the burden of proof. But for the stipulation, the plaintiff having proved the mistake in the message as believed, the *onus* would undoubtedly be upon the defendant to excuse its breach of the contract to transmit and deliver the message. But the contract having included a stipulation to the effect that unless repeated, the defendant should not be held liable for any mistake or delay in the transmission or delivery of the message, or for not delivering the same, beyond the sum received for sending it, unless the mistake, delay or failure arose from the wilful misconduct or gross neglect of the defendant, the plaintiff's right to recover more than the amount paid for sending the message (for which defendant in the present case by its answer offered to allow judgment) could not be established, except by proving wilful misconduct or gross negligence on the part of the defendant.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J., SHARPSTEIN, J., MORRISON, C. J., MCKINSTRY, J.

MCKEE, J.—I dissent. This was an action to recover damages for failure to transmit and deliver a cipher message to the person to whom it was addressed. On the 15th of December 1882, plaintiff delivered to the manager of the defendant, at its office in Stockton, for transmission to San Francisco, the following cipher message:

“December 15, 1882.

To GEO. W. McNEAR, San Francisco: Buy bail barley. Falun report by mail.
8 collect.

GEO. HART.”

Upon the receipt of the message at the Stockton office, the operator of the defendant promptly attempted to send it to San

Francisco ; but it was received in the San Francisco office in the following form :

“Stockton, Cal., Dec. 15.

San Francisco, December 15.

GEO. W. MCNEAR : Buy bain barley falun. Report by mail.
R. GEORGE HART.”

and in that form it was delivered to the person to whom it was addressed.

It will be observed that the substantial difference between the two messages is, that the word “bail,” in the message delivered for transmission, is changed to the word “bain,” in the message as received and delivered. Now, both words formed part of the secret cipher code of the sender and receiver of the message ; and, according to that code, the word “bail ” meant 100 tons, and the word “bain ” meant 225 tons. So that upon receipt of the message, as delivered to him, the plaintiff's agent immediately purchased for the plaintiff 225 tons, instead of 100 tons of barley ; and this resulted in a loss to the plaintiff of \$430, for which he seeks to make the defendant liable.

In the case there is no conflict of evidence. It is admitted that the word “bail ” was plainly written in the message which the plaintiff delivered to the manager of the defendant's office at Stockton. It was also proved, by evidence in which there is no conflict, that the message, as delivered, was carefully read by the manager, and by him handed to the operator for transmission ; that it was promptly transmitted over the wires to San Francisco ; that the operator at the San Francisco office and at the Stockton office, were both competent and experienced telegraph operators, and that the message was delivered in its altered form—the mistake consisting in the spelling of the word “bail.” In telegraphic orthography the word “bail,” is spelled thus : “B” is a dash and three dots ; “a” is a dot and a dash ; “i” is two dots, and “l” is a dash. “Bain” is spelled by the same lines and dots, except that the letter “n” is a dash and a dot. The actual mistake in the message was, therefore, the addition of a dot to the line in the last letter of the word ; and the question is, whether that mistake was the result of negligence on the part of the officers or agents of the defendant in the transmission of the message.

Under the code a telegraph company is not a common carrier

(sect. 2168, C. C.); it is, however, a carrier of messages for reward (sect. 2161, Id.), and, as such, it works under a law which binds it to the exercise of great care and diligence in the transmission and delivery of messages (sect. 2162, Id.). Like any other corporation or person it is therefore bound, in the exercise of its legal rights, to perform its duty without causing injury or loss to any one; and if it omits to perform in good faith any obligation imposed on it by law, it is liable for the consequences. No contract which it may make by its rules or regulations is allowed to exempt it from liability for misfeasance or nonfeasance in the performance of its duties. Such regulations for exemptions or immunity from liability for error or mistake, which results in loss to another, from the fraud or neglect of itself or its subordinate officers or agents, are considered in law as unreasonable, and being against public policy are void: *Sweatland v. Ill. Tel. Co.*, 27 Iowa 443; *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 233; 33 Id. 248; *Tel. Co. v. Fontaine*, 58 Ga. 433; *Ellis v. Am. Tel. Co.*, 13 Allen 226. If, therefore, a mistake occurs in the transmission of a message, from the fraud or neglect of the company, or any of its officers or agents, which results in loss to the sender or receiver of the message, the company is liable for the loss: sect. 1714, C. C.

In the case in hand plaintiff proved the mistake; in fact, it was admitted, and the loss which it occasioned him. That proof constituted a *prima facie* case upon which he was entitled to recover in the action. It was not necessary for him to show affirmatively how the mistake occurred, or whether it happened from some defect in the instrument which the company used, or the incompetency or inexperience of the company's operators, or of any omission of duty by the company or its officers. The mistake being admitted, the legal presumption was that it was caused by one or other of those causes, or all of them combined; and it was incumbent on the defendant to overcome that presumption, by showing that, in the transmission and delivery of the message, it exercised proper care and diligence, and that the mistake was not attributable to its fault or negligence, or the fault or negligence of any of its employees: *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; *Rittenhouse v. Ind. Line*, 44 N. Y. 263; *Baldwin v. U. S. Tel. Co.*, 45 Id. 744; *Relle v. W. U. Tel. Co.*, 55 Texas 308.

The defendant, however, did give evidence which tended to

prove that, during the transmission of the message, "fog and wind and a heavy storm prevailed," that owing to that state of the weather, the word "bail," in the message, was changed to the word "bain," and that the change was caused by what is known among telegraph operators as a "false signal, caused by the breaking of the current." Upon that question the superintendent of the company gave the following testimony:

"A. There are various causes that make the working of a telegraph wire uncertain even in good weather; faults in the instruments—unavoidable ones—may cause errors in the transmission of words or letters. Generally errors of this kind are caused by high winds, which bring two wires together or switch the limb of a tree against the wire, causing a momentary variation of the strength of the current. Dense fogs will also have the same effect.

"Q. Take the word 'bail,' written with a dash and three dots, a dot and a dash, two dots and a dash, assuming that word to have been correctly sent from the Stockton office to San Francisco, could the final 'l' be changed to 'n,' so as to reach San Francisco as 'bain,' not 'bail'?"

"A. A great many atmospheric influences could cause an error of that kind. It is called a false signal, caused by the breaking of the current. In this case there was a momentary break in the current, and that break might have made three dots; in this case it made only one additional dot at the end. If it broke in the middle it would make the letter 'M.'"

Still, however that may be, the mistake, whether it resulted from the negligence of the company or from natural causes beyond its control, could have been discovered and corrected if the message had been repeated; that is, sent back to the Stockton office for comparison with the original message. The company could have tested its accuracy in that way before delivery, if it was properly equipped for the performance of its functions. That it was so equipped, is evident from the admitted fact that the operator at San Francisco repeated the message for the purpose of discovering whether the word "falun," in the message, had been correctly transmitted.

But the contention is, that the plaintiff should have ordered the message repeated in order to secure its accuracy, because he had it transmitted under an agreement between him and the company, which reads as follows:

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it *repeated*; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

The message sent was in cipher, the sender did not explain its meaning nor order it to be repeated. Two questions, therefore, arose out of the case as it was submitted to the jury, namely: 1. Was the mistake the result of the negligence of the defendant or its officers, or of natural causes beyond their control? 2. Was the agreement, under which the message was transmitted and delivered, a defence to the action, or a restriction upon the liability of the defendant?

Upon the first of these questions the court instructed the jury as follows:

"The question for you to determine is one of fact. Whether or not plaintiff's loss was caused by the gross negligence of the defendant or its agents.

"If the jury believe from the evidence that a mistake was made in transmitting the message through the gross negligence of the defendant or of its servants, the verdict must be for the plaintiff.

"The defendant, however, as a defence to the action, insists that the message in question was what is known as an *unrepeated* message, and it contends, that in the case of such messages, it is only liable for the amount received by it for sending the message.

"If the jury believe that a mistake was made by the defendant, or its agents, in transmitting the message, through the gross negligence of the defendant, then defendant is responsible for the damage plaintiff suffered by reason of such mistake in transmitting said message, although the jury believe that plaintiff used one of the

forms of defendant having the terms printed at the top, as set out in defendant's answer, and that plaintiff assented and agreed to such terms, and did not require said message to be repeated or its correct transmission insured."

And upon the second question it refused to give the following instructions, which the defendant requested:

"If the jury believe from the evidence that plaintiff's original message was written upon one of the blanks of the defendant, and was an unrepeatable message, the defendant is only liable to the plaintiff in this action for the amount received by it for transmitting the same, to wit, the sum of thirty cents (30c.)."

"The defendant also alleges, as a defence, that the plaintiff's message was what is known as a cipher message; that is to say, that the true contents and meaning of the plaintiff's telegram were by him intentionally concealed from the defendant by the use of words arbitrarily selected, and having a different meaning from that ordinarily attached to them. If the jury believe, from the evidence, that the said message was, in fact, a cipher dispatch, and that no explanation was made to the defendant by the sender of said message, of the meaning, object or purpose of said message, then whatever damage the plaintiff may have sustained by reason of any mistake in said message must be borne by himself, and the defendant is only liable to the plaintiff for the amount received by it for transmitting the same, to wit, the sum of thirty cents (30c.), and no more."

It is objected that the instructions which the court gave to the jury were erroneous, because they were grounded upon the assumption of a fact, viz., gross negligence, of which there was no proof and no evidence from which it could be inferred: and because they ignored altogether a fact of which there *was* evidence, viz.: that the mistake was caused by circumstances which were beyond the control of the company.

But, as has been already shown, the company was bound by law to the exercise of great "care and diligence;" and if it failed to perform for the plaintiff the duty which it undertook, the plaintiff, upon proof of the failure and of the loss caused thereby, made out a *prima facie* case which entitled him to recover. That being so, it was in no way prejudicial to the defendant to characterize the want of great care and diligence, which occasioned the loss, as

gross negligence. Indeed, the phrase was more favorable to the defendant than if the court had merely used the term negligence.

There has been no legislative attempt to establish degrees in negligence since the repeal of sect. 17, C. C. Construed as an ordinary phrase, the term "gross negligence," as used by the court in its instructions to the jury, may, therefore, be considered as the equivalent of that want of great care and diligence exacted by the code of the company in the performance of its duties. The absence of such care and diligence as the circumstances demanded, would be therefore gross negligence. "Gross negligence," says ROLFE, Baron, in *Wilson v. Brett*, 11 M. & W. 113, "is the same thing as negligence, with the addition of a vituperative epithet." Any negligence is gross in one who undertakes a duty and fails to perform it: *Lord v. Midland Rd. Co.*, L. R., 2 C. P. 339. The tendency of judicial opinion is adverse to any distinction between the two expressions. "Strictly speaking," says BRADLEY, J., in *Railroad Co. v. Lockwood*, 17 Wall. 382, "these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence, it is more strictly accurate perhaps, to call it simply "negligence:" 1 Sm. Lead. Cas. 453; *Wilson v. Brett*, *supra*; *Hinton v. Dibbin*, 2 Q. B. 661; *Philadelphia Rd. Co. v. Derby*, 14 How. 486; *Steamboat N. W. v. King*, 16 Id. 474.

The instructions which the court gave to the jury were correct so far as they went. But it is contended that they did not go far enough, because they did not contain any instruction upon the evidence in the case, that the mistake in the message resulted from uncontrollable natural causes.

It would certainly have been the proper thing to have covered that point by the instructions. But if the instructions given in the case were incomplete, because they did not present the law

applicable to all the points for which both parties contended, it was the right and privilege of either party to ask for proper instructions upon any omitted point. This was not done, and the party who failed in that respect to exercise his right cannot now be heard to complain. It is well settled that a party cannot, in a court of error, avail himself of an omission in the charge of the court, where he made no request to the court on the subject: *People v. Ah Yute*, 53 Cal. 613; *People v. Ah Wee*, 48 Id. 237; *People v. Collins*, Id. 277; *Express Co. v. Kuntze*, 8 Wall. 342; *Horler v. Carpenter*, 27 L. I. C. P. 1.

The last assignment of error is, that the court improperly refused to give the instructions asked by the defendant.

The plaintiff made out a *prima facie* case. That case could not be overcome by any mere rules or regulations of the company. As already stated, the company could not, by its rules and regulations, absolve itself or its officers from the exercise of that great care and diligence which the law and the circumstances of the case demanded.

One of the plainest of its obligations is to transmit and deliver the very message prescribed. "To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office:" *N. Y. & W. Tel. Co. v. Dryburg*, 35 Penn. St. 298. That could have been done without understanding the meaning of the words used in the message, and the sender was not bound to explain it. Although the words may have been a jargon to the officers of the company, the officers were bound, without regard to the meaning of the words, to transmit and deliver them as they were written, and, if that could have been done by repeating the message, the duty would seem to have been upon them to have had it repeated, in order to secure accuracy in its transmission and delivery.

The Western Union v. Blanchard, 68 Ga. 309, was an action to recover damages for a mistake in a cipher dispatch caused by the fault of the operator, and it was insisted, by way of defence, that the company was not liable for the consequences of the mistake beyond the amount fixed by the agreement, between the sender and the company, which, in its terms, was similar to the agreement in this case. But the court said: "We can only say that any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment, with integrity,

skill and diligence, contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it become necessary for the company, in transmitting messages with integrity, skill and diligence, to secure accuracy to have said messages repeated, then the law devolves upon it that duty to meet its requirements. We know of no law in this state that limits their tolls on messages; this is under their own control. A message must be transmitted with integrity, skill and diligence, and the mode of attaining accuracy in such work they have at their command—the compensation paid therefor the law does not seek to limit or restrict: 28 Ga. 543; 58 Id. 438; 34 Id. 215; 1 Daly Cases 288; 29 Md. 222; 27 Iowa 432; 60 Me. 530.”

The rule or regulation as to repeating a message is therefore not sanctioned by law; and to say that telegraph companies shall only be liable for the amounts received for transmission, is practically to excuse them altogether. So, in *Tyler v. W. U. Tel. Co.*, 60 Ill. 421, the Supreme Court of Illinois said: “On the assumption that it is the duty of the company to transmit correctly the message for which they have received compensation, where, in law, arises any obligation on the part of the sender to repeat the message? * * * And as the receiver of the message, it was not his duty to telegraph back to ascertain the correctness of the message. The company was bound to send the message correctly in the first instance. * * * We fail to perceive any consideration whatever on which to base the so-called contract, that the sender shall order the message repeated. The company have no right to demand of the sender an assurance for the faithfulness of their own conduct. Such a contract, forced as it is upon the sender, is not of any legal or binding force.”

Upon the subject of the liability of the company for a mistake in the transmission of an unrepeatd message, there is, undoubtedly, a conflict of authorities; but as we have already stated the rule deducible from all the cases is, that a mistake in the transmission of a message is *prima facie* evidence of negligence, and the burden is on the company to show to the contrary; and if it be found that the mistake was due to the negligence of the company or its servants, the company is liable for all the loss occasioned by it, and the special contract between the company and the sender, for the transmission of the message, is no defence. But if it be found that the mistake was not due to the negligence of the company, the defend-

ant is not liable beyond the terms of any valid contract between the company and the sender under which the message was transmitted.

I think there is no error in the record, and the judgment and order appealed from should be affirmed.

THORNTON, J., also dissented.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ARKANSAS.¹

SUPREME COURT OF ILLINOIS.²

SUPREME COURT OF OHIO.³

SUPREME COURT OF VERMONT.⁴

ACCORD.

Payment of Part—Agreement to Accept from Third Person.—An agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money and execution of a formal and positive instrument of release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act: *Gordon v. Moore*, 44 Ark.

An agreement by a creditor to accept from a third person, in behalf of the debtor, money or a security for a smaller sum in satisfaction of the whole, is valid and binding and will discharge the debt: *Id.*

AGENT. See *Mortgage*.

AMENDMENT.

Declaration—Damages—Increasing ad damnum after Verdict.—There is no error in allowing an amendment of a declaration by increasing the *ad damnum* after verdict. Such an amendment relates to matter of form, rather than substance: *Tomlinson v. Earnshaw*, 112 Ill.

ATTACHMENT.

Undisclosed Principal.—Property purchased by an agent in his own name for an undisclosed principal, cannot be seized for the debt of the agent unless his creditor has been misled by appearances or the conduct of the parties into giving him credit upon a false basis: *Reed v. McIlroy*, 44 Ark.

¹ From B. D. Turner, Esq., Reporter; to appear in 44 Ark. Rep.

² From Hon. N. L. Freeman, Reporter; to appear in 112 Ill. Rep.

³ From E. L. DeWitt, Esq., Reporter; the cases will probably appear in 42 or 43 Ohio St. Rep.

⁴ From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

BANKRUPTCY.

Debt Created by Fraud—Constructive Fraud.—The plaintiffs, as an accommodation to themselves, gave an order to the defendant directing their debtor to pay him what was due them. He collected and used the money by mingling it with his own; and in a few days afterwards was adjudged a bankrupt. After his discharge, in an action to recover the money, the court below found that there was no evidence tending to show actual fraud or fraudulent intent. The plaintiffs testified that when the order was given they told him "to keep the money until they called for it;" the defendant testified that they told him "to keep and use the money until they called for it." The jury found that the plaintiffs were right as to the instructions given: *Held*, that the defendant's duty was that of a bailee without hire; that his use of the money was a conversion of it and a fraudulent act; that the debt was "created by fraud," within the meaning of the bankrupt act and not discharged: *Hammond v. Noble*, 57 Vt.

BILLS AND NOTES. See *Surety*.

COMMON CARRIER.

Coupon Tickets over several Lines—Liability of Companies—Ejection of Passenger—Damages.—Through tickets in the form of coupons, sold to a passenger by one railroad company, entitling him to pass over successive connecting lines of road, in the absence of an express agreement create no contract with the company selling the same, to carry him beyond the line of its own road, but they are distinct tickets for each road, sold by the first company as agent for the others, so far as the passenger is concerned: *Pennsylvania Railroad Co. v. Connell*, 112 Ill.

Where a coupon ticket has been sold calling for passage over several distinct lines of railroad, the rights of the passenger, and the duty and responsibility of the several companies over whose roads the passenger is entitled to a passage, are the same as if he had purchased a ticket at the office of each company constituting the through line: *Id.*

Where a conductor of a railway company, acting under instructions from his superior, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if his ticket was issued by authority, may pay the fare again and recover of the company requiring payment the sum paid, as for a breach of contract, or he may refuse to pay, and leave the train when so ordered by the conductor, and sue and recover of the company all damages sustained in consequence of his expulsion from the train; but if he refuses to leave, he cannot recover for the force used by the conductor in putting him off, when no more force is used than necessary, and the expulsion is not wanton or wilful: *Id.*

CONSTITUTIONAL LAW. See *Taxation*.

CORPORATION.

Forfeiture of Franchise—In what Proceeding to be Determined—Injunction—Ultra Vires.—A cause of forfeiture of a franchise can not be taken advantage of, or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation: *Attorney-General v. Chicago and Evanston Railroad Co.*, 112 Ill.

Where a corporation has ceased to exist, and is absolutely dead in law, a court of equity has jurisdiction to enjoin threatened acts by persons assuming to act on behalf of, and in the name of the dead corporation: *Id.*

And if a valid corporation assumes to exercise licenses or powers by virtue of an invalid ordinance of a municipal corporation, or in excess of authority legally conferred upon it, a court of equity, upon a proper showing, has jurisdiction to interfere and restrain it: *Id.*

DAMAGES. See *Common Carrier*.

DEBTOR AND CREDITOR.

Conditional Sale—Lease—Assignee.—Property sold conditionally and delivered, without a legal record of the lien, passes to the assignee of the vendee under the insolvent law: *Collender Co. v. Marshall*, 57 Vt.

A contract by which a vendee of billiard tables agrees to pay in monthly instalments in one year the entire value of the tables, and if he so paid the property was to be his, and if not, the vendor's, is a conditional sale, and not a lease: *Id.*

When one here orders goods from a party in New York on certain terms, as to payment, &c., but they are shipped, consigned to the vendor, and accepted on different terms: *Held*, that the contract was made in this state: *Id.*

FRAUD. See *Mortgage*.

FRAUDS, STATUTE OF.

Sale of Land—When not within.—The plaintiff's house being mortgaged, he entered into a parol contract with the defendant to purchase the mortgage, sell the house, and after satisfying the mortgage debt, costs, &c., to pay the balance to the plaintiff. The defendant purchased as agreed, foreclosed, and sold the house, the plaintiff in reliance on the contract allowing the equity of redemption to expire: *Held*, that the plaintiff in assumpsit could recover the balance; that the contract was not within the Statute of Frauds, in that it was not for the sale of lands or an interest in or concerning them, and could be completely performed within one year; that parol evidence was admissible to prove the contract: *McGinnis v. Cook*, 37 Vt.

Promise of Executor in consideration of Agreement not to Dispute Will.—The promise of an executor to pay \$5000 to one of the testator's heirs-at-law, who received nothing under the will, in consideration that he would forbear further opposition to the probate of the will, claimed to have been made as it was through undue influence, is not within the statute; and such forbearance is a sufficient consideration: *Bellows v. Sowles*, 57 Vt.

GUARDIAN AND WARD. See *Infant*.

Pledge of Ward's Property—Right of Ward as against Purchaser.—A former guardian of the plaintiff's ward pledged to the defendant bank to secure his own note two negotiable bonds owned by the ward, on which bonds was an endorsement tending to show the ward's ownership, and which was seen by the cashier at the time of the negotiation. *Held*, 1, that the defendant was not entitled to the protection of an innocent purchaser; that it was put upon inquiry, and that it was not

sufficient to only inquire of the guardian; 2, that the plaintiff could recover the bonds in an action of replevin; 3, that the settlement of the guardian's account in the Probate Court did not affect the title to the bonds: *Langdon v. Baxter Nat. Bank*, 57 Vt.

HUSBAND AND WIFE. See *Surety*.

INFANT.

Negligence of Child—Liability of Parent.—The relation of the defendants was that of father and son. The son was twenty-eight years old, and, while living with his father as a hired man on his farm, took his father's horse and drove three miles to the railroad depot to get one of his own friends. The father did not know that the son took the horse until after he was gone; but expected and was willing that he should do so. The son had driven the team before without permission. The horse, tied to a post in the rear of the depot, where the defendants were accustomed to hitch, broke away, ran into the plaintiff's team and injured him. The referee found that the son in tying the horse "did not exercise the prudence of an average prudent man." *Held*, that the father was not liable, but that the son was; that license to use the horse could not be inferred from the fact of former use without leave: *Way v. Powers*, 57 Vt.

Duty of Court to protect—Failure of Guardian to interpose proper Defence.—An infant suitor or defendant, when brought into court, becomes the ward of the court, whose duty it is to see that his rights in the subject-matter of the litigation are properly presented and protected. If the general guardian fails to appear, the court should appoint a guardian *ad litem* to look after the infant's rights: *Lloyd v. Kirkwood*, 112 Ill.

If the guardian who undertakes this trust, whether he be the general guardian, or guardian *ad litem*, fails to properly protect the interests of the ward, it is the duty of the court, *sua sponte*, to compel him to do so whenever that fact comes to the knowledge of the court. The court should see that the proper pleadings are made to present any defence the infant may have: *Id.*

Where a bill to establish and enforce a resulting trust as against an infant heir, showed upon its face that the alleged trust arose twenty-five years before suit, and the court rendering a decree therein against the infant failed to require the guardian *ad litem* to set up the laches in defence, it was *held*, that the proceedings and decree against the infant showed error on their face, sufficient to justify the court in setting the decree aside on bill filed by the infant: *Id.*

LANDLORD AND TENANT.

Untenantable Premises.—The lessee of a room in a block covenanted to keep the premises in good and constant repair. A building was thereafter erected on an adjoining vacant lot by the owner thereof, not the lessor, whereby the demised premises were, to a great extent, cut off from light and ventilation, and were also rendered damp and unhealthy, but were capable of being made tenantable by repairs: *Held*, that the lessee was not authorized to abandon the lease and refuse payment of the accruing rent: *Hilliard v. N. Y. & C. Gas Coal Co.*, 42 or 43 Ohio St.

LIMITATIONS, STATUTE OF.

Cause accruing in other State.—The Statute of Limitation, R. L. s. 970, is not a defence, when the cause of action accrued in another state, unless both parties resided there at the time the cause of action accrued; thus, the plaintiff resided in Ohio and the defendants in Pennsylvania, when the debt was contracted, the residence of neither party having been changed: *Held*, that the statute was not a bar: *Troll v. Hanauer*, 57 Vt.

MANDAMUS.

The right to a writ of mandamus to enforce the performance of an official act by a public officer depends upon his legal duty and not upon his doubts; and where his duty is clear, its performance will not be excused by his doubts concerning it, however strong or honest they may be: *State v. Turpen*, 42 or 43 Ohio St.

MORTGAGE.

Fraud—Agency—Bona Fide Purchaser.—R., the owner, having sold land and taken a mortgage thereon from the vendee to secure the payment of the purchase-money, afterwards executed a release of the mortgage and took a second mortgage on the premises from the vendee, for the balance of the purchase-money then unpaid. The release and second mortgage were entrusted by R. to the vendee, to be by the latter entered for record. The vendee caused the release to be duly recorded, but failed to deliver the second mortgage for record. After the release was recorded, the vendee made his notes and executed a mortgage on the premises to L. to secure the same, without consideration therefor, which mortgage was immediately recorded, and on the 17th of January 1879, the notes were endorsed and delivered, and the mortgage was assigned by L. to J., a *bona fide* purchaser for a valuable consideration, without notice. After the mortgage to L. had been recorded, the vendee returned the unrecorded mortgage to R., who filed it for record on the 21st of April 1879: *Held*, that the mortgage of J. was the first and best lien on the premises: *Ramsey v. Jones*, 42 or 43 Ohio St.

NEGLIGENCE. See *Infant*.

Bridge Owners—Failure to prevent Accumulation of Drifts.—It is the duty of the owners of a bridge across a navigable stream to use reasonable diligence to prevent such accumulation of drift about the bridge piers, either above or below the surface of the water, as might endanger navigation; and for failure to use such diligence they will be liable for damages resulting from such obstruction to crafts navigating the river, unless there was contributory negligence in the careless and unskillful piloting of the craft; *St. Louis, Iron Mountain and Southern Railway Co., v. Meese*, 44 Ark.

Crossing Railroad Track—Omission to Stop, Look and Listen—Question for the Jury.—It is the duty of a person about to cross a railroad track, to approach cautiously, and endeavor to ascertain if there is present danger in crossing; and when the railroad track and crossing are so situated, that the approach of a train can not be seen, it may be the duty of a person about to cross, to stop and look, to ascertain if a train is coming: *Pennsylvania Co. v. Franer*, 112 Ill.

It is a question of fact for the jury to determine from the evidence, whether a person receiving an injury from the alleged negligence of another, and who sues to recover therefor, has exercised proper care and caution on his part, and not one of law. It is not for the court to tell the jury that certain facts constitute negligence, and an instruction so telling the jury is erroneous: *Id.*

In an action against a railway company, the court was asked by the defendant to instruct, that if the jury believed, from the evidence, that the plaintiff "could have discovered the approach of defendant's train, and avoided the injury in question by having stopped his mule before driving upon the track, and looking and listening for the approach of said train, then he can not recover in this case, unless," &c.: *Held*, properly refused, as it virtually took the question of fact (plaintiff's care or negligence) from the jury: *Id.*

PARENT AND CHILD. See *Infant*.

PARTITION.

Not Maintainable for Land adversely held.—A party claiming the legal title to an undivided interest in land cannot maintain proceedings for partition with his co-tenant, while his interest is held adversely by others. He must first establish his title at law: *Moore v. Gordon*, 44 Ark.

PARTNERSHIP.

Test of—Participation in Profits.—The rule that participation in the profits of a business, was the test of partnership as to liability to creditors, has been abandoned in England, and generally in America; and now the test is whether the business has been carried on in behalf of the person sought to be charged as a partner; i. e., did he stand in the relation of principal towards the ostensible traders by whom the liabilities were incurred, and under whose management the profits have been made; but as between the parties themselves, the test has always been their actual intent; *Culley v. Edwards*, 44 Ark.

PLEADING. See *Amendment*.

RAILROAD. See *Common Carrier*; *Negligence*.

RECEIVER.

Application of Funds—Priority of Mortgages.—The holder of a second mortgage in an action to foreclose, made all lien holders parties, prior and subsequent, and moved for the appointment of a receiver to collect rents and income of the mortgaged lands pending the action. The appointment of a receiver was refused. Afterwards a junior mortgagee commenced an action to foreclose making all lien holders parties, and upon his motion a receiver was appointed: *Held*, that the fund collected by the receiver, was applicable to the liens on the property in the order of their priority: *Williamson v. Gerlach*, 42 or 43 Ohio St.

MORTGAGE. See *Receiver*.

REPLEVIN.

For Goods Intermixed.—Replevin cannot be maintained for a mass of

cotton in which the plaintiff's has been innocently mixed by the defendant, nor for an undivided share of the mass. It must be first separated and capable of identification : *Hart v. Morton*, 44 Ark.

SALE. See *Debtor and Creditor*.

STATUTE.

Construction of—When "may" means "shall."—The word "may," in a statute, means "shall" whenever the rights of the public or third persons depend upon the exercise of the power, or the performance of the duty to which it refers. The word has such meaning in the proviso of section 90 of the practice act : *James v. Dexter*, 112 Ill.

SURETY.

Collateral Note by Wife as Surety—Extension of Original.—Wise needed money to pay judgments that were pressing him. Willard agreed to endorse his note to S. for \$2700, at four months, if Wise and wife would make to him (Willard) their note for \$3000, at four months, secured by mortgage on the wife's land ; he to hold and use said mortgage to protect himself against loss and expense because of said endorsement. Neither note was paid at maturity. The mortgage note was never extended, but the other note was renewed by agreement of the parties to it for a valuable consideration. It remained unpaid, and Willard sued Wise and wife on the mortgage note. She set up the extension of the \$2700 note as a release of her property : *Held*, as Willard made no extension of the mortgage note he did not lose his right to enforce the mortgage for his indemnity. The extension of the \$2700 note did not affect the right of the wife to pay the \$3000 note and enforce reimbursement by her husband : *Wise v. Willard*, 42 or 43 Ohio St.

Collateral Note—Extension of Original.—Where the payee of a promissory note for \$1500 held another note of the makers for \$1000, given as collateral to the first note, with sureties, and payable at a time to which the payment of the principal note had been extended, and the payee after the maturity of the collateral note again extended the time of payment of the principal note for a definite time, by a valid agreement and without the consent of the sureties on the collateral note, he thereby discharged them : *Slagle v. Pow*, 42 or 43 Ohio St.

TAXATION.

Corporation—Shares of Non-Resident—Stockholders.—Under our statute the stock of non-resident stockholders of a corporation located in this state may be legally set in the list of the town in which the corporation has its principal place of business ; and the corporation compelled by mandamus to pay the taxes assessed upon such stock : *Town of St. Albans v. Nat. Car Co.*, 57 Vt.

A statute authorizing such taxation, and allowing the corporation to deduct the taxes thus paid from the dividends due to such stockholders, is constitutional : *Id.*

When a charter is taken subject to future legislation, it may be modified not only by special amendments, but also by a general law : *Id.*

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GARNISHMENT.

GARNISHMENT is a proceeding at law, whereby a creditor may lay hold of debts, credits or property, belonging to his debtor, but in the hands of a third person, and subject them to the payment of his debt. The proceeding is variously known in the different states as foreign attachment, factorising, trustee process, and garnishment. It has its origin either in local custom or statutory provision. In Vermont, and probably in most of the states, it does not exist except by force of statute. In the statutes, therefore, will be found the basis of the jurisdiction of courts, in applying this remedy, together with the method of its application: *Baxter v. Vincent*, 6 Vt. 614.

What establishes Liability.—The liability of a garnishee, both to the principal debtor and his creditor, is governed by the contract or other relations existing between the garnishee and principal debtor. Garnishment cannot have the effect of changing the nature of a contract between the garnishee and the principal debtor, or of preventing the garnishee from performing a contract with a third person. If by any pre-existing *bona fide* contract, the accountability of the garnishee to the principal debtor has been removed or modified, the garnishee's liability is correspondingly affected. Thus a contract, anterior to attachment, *bona fide*, and for good consideration, between two railroad companies, whose roads connected, and who had established a system of through freight

and fares, under which each received and advanced for the other, and balances were to be settled monthly between them, controls an attachment of the funds of one company in the hands of the other: *Balt. & Ohio Rd. Co. v. Wheeler*, 18 Md. 372.

Who are Liable.—As a general rule corporations, as well as natural persons, are by statute made liable to garnishment: *Balt. & Ohio Rd. Co. v. Gallahue's Adm'r*, 12 Gratt. 655. But in general, a person who is not and never has been a resident within the state wherein the process of garnishment is sued out, is not liable to it: *Hart v. Anthony*, 15 Pick. 445; *Ray v. Underwood*, 3 Id. 302; *Miller v. Hooe*, 2 Cranch C. C. 622; *Baxter v. Vincent*, 6 Vt. 614; *Jones v. Comings*, 6 N. H. 497. In Massachusetts, a railroad company incorporated by the laws of another state, cannot be charged by trustee process, although in possession of railroads in Massachusetts under leases from the proprietors thereof: *Gold v. Housatonic Rd. Co.*, 1 Gray 424. Nor can a foreign corporation that has no goods, effects or credits within Massachusetts be charged by trustee process, although many of the members and officers of such corporation reside in that state, and its books and records are kept there: *Danforth v. Penny*, 3 Metc. 564. Funds in possession of the president, officers and agents of a railroad company are in possession of the company, and are not subject to garnishment in an ordinary action by a creditor against the company: *Wilder v. Shea*, 13 Bush 128. The appropriate action by a creditor against a railroad company is by application to a court of equity, seeking a discovery as to the condition of the company, and upon the failure of the chief officer or officers of the company to pay when directed, they may be imprisoned for contempt, and the chancellor will take possession of the road by placing it in the hands of a receiver, and apply the net income or surplus-fund to the payment of the creditor's claim. "To permit any and every agent of a corporation like this to be garnisheed before or after judgment, would result in the sacrifice of all the private and public interests connected with it. The chancellor, by giving to the creditor the income of the road, retaining enough to pay the necessary expenses of the corporation, has given him all that he has the right to demand, and at the same time preserves the corporate property for private and public use. Nor does this ruling prevent a corporation from being garnisheed as the debtor of a third party, whose creditor is seeking to make his debt; in such

a case, however, the court will require payment to be made in the same manner as if the company were the real debtor." Per PRYOR, J., in *Wilder v. Shea*, 13 Bush 187. In *Dobbins v. Orange and Alexandria Ry. Co.*, 37 Ga. 241, it was held that the Western Atlantic Railroad, being the property solely of the state of Georgia, and under the power of the legislature at all times, the superintendent belonged to that class of public agents, like the governor and treasurer of the state, whom reasons of policy exempt as such agents from process of garnishment. And a carrier who receives goods under an engagement to forward them to the consignee, cannot hold them to answer an attachment at a suit of the creditor of the shipper, previously served upon him, nor is he liable in respect to him upon the attachment: *Bingham v. Lamping*, 26 Penn. St. 340.

Indemnity.—At common law, the sheriff, or other officer serving a writ, has a right to indemnity before seizing goods on an execution where the defendant's property in them is disputed, and this principle extends to seizures under a foreign attachment, or an execution attachment, so as to protect the sheriff, and through him the garnishee, where the sheriff makes him his bailee pending the process. The plaintiff and the sheriff cannot by a mere copy service of the writ escape the risks of the attachment and throw them upon the garnishee, by requiring him to retain the goods when the title to them is in dispute: *Shriver v. Harbaugh*, 37 Penn. St. 399.

Service, and what is Liable.—In garnishment or foreign attachment, the first thing is to "serve" the property, and next the person in whose hands it is found; but the writ may be well executed when the officer is prevented by fraud or force from getting at the property. In such cases, the return should show the facts, and that the officer has attached as nearly according to the requirements of the statute as possible; if the property is in the hands of the garnishee he cannot take advantage of his own wrong on the ground of a defective service: *Pennsylvania Railroad Co. v. Pennock*, 51 Penn. St. 244. Ordinarily where a corporation is summoned as trustee, service of the writ by leaving a copy at the place of last and usual abode of the treasurer or other proper officer is sufficient: *Harris v. Somerset & Kennebec Ry. Co.*, 47 Me. 298. The statutes generally designate upon what officer of a corporation service of writs shall be made. Such statutory provisions must of course be followed. In Georgia it has been decided that the Cen-

tral Railroad and Banking Company cannot be served with a summons of garnishment by serving *any one* of its agents. The service must be on the president of the company: *Clark v. Chapman & Central Railroad & Banking Co.*, 45 Ga. 486. The service of garnishment process against a railroad company returned in these words: "Served on the Montgomery and Eufaula Railroad Company, the garnishee, by leaving a copy of the garnishment with Lewis Owen, President of said road," is sufficient to authorize a judgment *nisi* on failure to answer, against the company, if there is no appearance for the company: *Montgomery & Eufaula Rd. Co. v. Hartwell*, 43 Ala. 508. But the return of a sheriff in a foreign attachment, "Executed by delivering to D. A. Stewart, agent of the Pennsylvania Railroad Company, a true and attested copy of the within writ, and making known the contents thereof, and summoning the Pennsylvania Railroad Company as garnishee," is not proper. The property was susceptible to seizure if present; and not being present, and there being no seizure or declaration in the presence of witnesses, it was not bound by the writ, and therefore no person was bound to answer as garnishee: *Pennsylvania Rd. Co. v. Pennock*, 51 Penn. St. 244. And service of notice of a judgment *nisi* rendered on the failure of the Montgomery and Eufaula Railway Company, the garnishees, to answer, returned in these words: "Executed by leaving a copy of the within with Lewis Owen, President of the Montgomery and Eufaula Railroad Company, this 4th day of May 1868," is insufficient to sustain a judgment final on said judgment *nisi* without proof that Owen was president at the date of service: *Montgomery & Eufaula Rd. Co. v. Hartwell*, 43 Ala. 508. Where a corporation, summoned as trustee, has appeared, submitted to the jurisdiction of the court and made disclosure, and judgment has been entered, it is too late to object to a service defective in respect to the place of leaving a copy of the writ: *Harris v. Somerset & Kennebec Ry. Co.*, 47 Me. 298. It would seem that any property or choses in action owned by a railroad company but in the hands of a third person might be garnisheed to meet the claims of the company's creditors, and this appears to be the general rule. But it was intimated that under the Wisconsin statute a garnishee was liable only for "property" which might be turned out on execution; or "indebtedness" for which an action or assumpsit would lie in favor of the principal defendant: *Keyes v. Mil. & St. Paul Rd. Co.*, 25 Wis. 691. And

in *Balt. & Ohio Rd. Co. v. Gallahue's Adm'r*, 12 Gratt. 655, it seems that the statute in relation to attachment at law refers to debts due from the garnishee to the defendant at the time of the service of the process upon the garnishee. In the same case it was queried whether the statute operates at law upon debts which though due at the time of the service of the attachment upon the garnishee were not then payable. It is difficult in this matter to lay down rules of general application, garnishment being to so great an extent a purely statutory proceeding. It has been decided, however, that the income of a railway company earned after a mortgage authorized by statute took effect might, so long as the company remained in the management and use of its property, be attached by trustee process to secure a claim, accruing since the mortgage became effectual, for negligently injuring the property of the plaintiff at a highway crossing: *Smith v. Eastern Ry. Co.*, 124 Mass. 154; *Degraff v. Thompson*, 24 Minn. 452; but a different view was taken in Illinois, where a corporation had given a mortgage or trust deed of all its property, tolls, incomes, franchises, &c., to secure the principal and accruing interest on its bonds, and its revenues so pledged were held not liable to garnishee process by its judgment creditors, after the execution by it, of such mortgage or trust deed: *Galena & Chicago Union Rd. Co. v. Menzies*, 26 Ill. 121. Where a city, by its vote, has in accordance with the charter of a railway company, designated on what part of the railway line the money raised and subscribed by it should be expended, a general creditor cannot by trustee process direct and hold such money for a debt not contracted for the purpose designated: *Pike v. Bangor & Calais S. L. Rd. Co.*, 68 Me. 445. Where a railroad company contracts to pay on a specified day of each month, for seventy-five per cent. of the work done by their employees in the preceding month, upon a stipulation that the balance shall be retained as a forfeiture, if the employee should fail to fulfil his part of the contract, and the value of the whole month's work is to be estimated and certified after the end of the month, before any payment for it is to be made, no indebtedness arises for any part of it, before the month has expired; and therefore no part of such value can be secured by summoning the company as trustees before the month has expired. It was also decided that while the employee's part of the contract remains unfulfilled, the contingent twenty-five per cent. is not attachable by trustee process. Finally, it was

held, that a party summoned as trustee, while it is contingent whether he will be indebted to the principal defendant, will be discharged. And that the changing of such a contingent into an absolute indebtedness, after the service upon the trustee, though before the judgment, will have no effect to render the trustee chargeable: *Williams v. Androscoggin & Kennebec Rd. Co.*, 36 Me. 201; see also, *Harris v. Somerset & Kennebec Ry. Co.*, 47 Id. 298. Money in the hands of a station agent of a railway company, received for tickets sold and freight collected, cannot be attached in his hands by trustee process, in a suit against the company, by one of its creditors: *Pettingill v. Androscoggin Ry. Co.*, 51 Me. 370; *Fowler v. Pitts., Ft. W. & C. Ry.*, 35 Penn. St. 22; *Gery v. Ehrgood*, 31 Id. 329.

Answer.—If a corporation be made a garnishee it may answer by its proper officers, but the answer must be sworn to: *Oliver v. Chicago & Alton Rd. Co.*, 17 Ill. 587. And its answer must be in the only mode in which a corporation can answer, *i. e.*, under its corporate seal: *Balt. & Ohio Ry. v. Gallahue's Adm'r*, 12 Gratt. 655. It may answer by its attorney, and he need not be a member of the corporation, or their general business agent. His answers are to be considered true until disproved; thus when, after due examination and inquiry, the attorney, through whom the disclosure of a corporation is made, shall have answered all the interrogatories according to his best belief and information, if his statement show that the corporation has no goods, effects or credits of the defendant, and if no opposing proof is introduced, the corporation is to be discharged, although its attorney had no personal knowledge of its dealings, but derived his information wholly from its books and the statements of its officers: *Head v. Merrill*, 34 Me. 586. As a general rule the answer of a garnishee must stand, whether it be a denial or affirmation of new matter, until evidence is produced tending to overthrow it: *Holton v. So. Pac. Ry. Co.*, 50 Mo. 151. A corporation can only be compelled to answer in the place where it may be lawfully sued. Thus the Central Railroad and Banking Company of Georgia, has, by law, its principal office of business at Savannah, and it cannot be required to answer a summons of garnishment in any other county than the county of Chatham unless it appear on the record that the debt it is charged to owe is within some of the statutes authorizing corporations to be sued out of the county where the principal business office is situate:

Clark v. Chapman & Central Rd. & Banking Co., 45 Ga. 486. The garnishee is bound to answer before the default day in the term of the court wherein it is summoned, unless by leave of court further time is given it to answer, and if the corporation being garnisheed neglects so to answer until the plaintiff has obtained his judgment against the principal debtor, and the jurors have been discharged for the term, it is error in the court to permit it then to answer, unless for good cause shown. *Ibid.* A supposed trustee, in addition to his sworn answer and statement, may allege and prove any other fact not stated or denied by him that may be material to the decision of the question of his liability: *Staniels v. Raymond*, 4 Cush. 315. A railway corporation in making a disclosure by its agent under a trustee process is not concluded by the entries upon its books, although they show a balance to be in favor of the principal defendant. If the agent discloses that it arose from mistake or fraud in the amount of credit reported, and no facts are disclosed showing that there was no such error, the corporation is not chargeable as trustee: *Bigelow v. York & Cumberland Rd. Co.*, 37 Me. 320.

Defences.—Any defence may be made to an action of garnishment which can be successfully urged to an action brought by the principal debtor against the garnishee to recover the debt, property or other demand sought to be garnisheed. So a tender of the property demanded may be made, and it will cut off any claim for costs. Where a railroad company is charged as trustee by an employee, whose claim is payable in stock, a tender of certificate of a sufficient number of shares, duly signed and filled out, except as to the name of the holder, is sufficient, although such certificates be not separated from the treasurer's book: *Harris v. Somerset & Kennebec Rd. Co.*, 47 Me. 298. And a set-off or lien of the garnishee upon the property or debt due from him may be made in defence to the garnishment. Thus where A., having obtained possession of chattels under a judgment against B., used them until the judgment was reversed and the property awarded B., the claim of B. for such use would be a good set off against any liability on his part to A. which might subject him to garnishment: *Keyes v. Mil. & St. Paul Rd. Co.*, 25 Wis. 691. Where property of the principal defendant was taken under a *bona fide* claim of ownership, and so used in processes of manufacture or otherwise, as to lose its identity, the garnishee's only liability therefor is in damages for the conversion.

Such damages are not the subject of garnishment: *Keyes v. Mil. & St. Paul Rd. Co.*, 25 Wis. 691. After garnishment, however, the garnishee has no right to pay the debt or deliver the property garnished to the principal debtor. If he does so it is a contempt of court, for which he may be punished in the discretion of the court, and such payment or delivery would subject the garnishee to an action for damages. Where the officer's return on a writ of garnishment shows that it was served on the garnishee at a stated hour, a payment made by the garnishee to the principal debtor on the same day would be regarded as subsequent to the service of the writ, in the absence of proof to the contrary: *Harris v. Somerset & Kennebec Rd. Co.*, 47 Me. 298. B. was authorized to canvass for and receive subscriptions for the capital stock of a railroad company, then unorganized, his compensation to be one dollar per share on all subscriptions obtained by him, to be paid in the manner prescribed in the resolution conferring said authority, "and the further sum of three per cent. upon the whole amount of subscriptions which he may be instrumental in obtaining, to be paid as the subscriptions to the capital stock shall be paid in." Under the authority thus given, B. procured subscriptions to the capital stock of the company. Subsequently a very large amount of stock so procured to be subscribed by B. was forfeited under the charter for non-payment of instalments due thereon, and the forfeitures were not remitted by the company, nor did they sell, or attempt to sell, any part of the stock so forfeited, nor did they institute actions for the recovery of any of the subscriptions for said shares. Upon an attachment issued on a judgment recovered against B., and laid in the hands of the railroad company, for the purpose of affecting B.'s supposed claim against the company for commissions upon the amount of the subscriptions unpaid on the forfeited share, it was *held*, 1st. That there were no rights or credits in the hands of the company belonging to B., in respect to said forfeited shares. 2d. That until the money subscribed or its equivalent was realized by the company, either by the voluntary payment of the subscriber or his assignee, or by the modes of coercion designated by the charter, no commission could be claimed as due and payable thereon under the contract. 3d. That whatever may have been the cause of the delay on the part of the company in attempting to make the subscriptions available, as the agent procuring the subscriptions is interested in the money to be realized therefrom, it may be that he has ample rem-

edy by which to compel the company either to sell the stock or to remit the forfeitures and institute actions to recover the balance due on the subscriptions. 4th. But until that be done and the money actually realized there is no such certain or ascertainable amount due for commissions under the contract as to be liable to attachment: *Maryland Agricultural College, use of J. H. Skinner, v. Balt. & Potomac Rd. Co., Garnishee of Robert Bowie*, 43 Md. 434. And where the garnishee is sued by the principal debtor to recover the debt or property, he may set up the garnishment in defence of the action. Thus in an action to recover money due on a contract, it is a sufficient defence to show that the money sought to be recovered has been attached by garnishment duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appears that the plaintiff and such creditors are all residents of the state in which the plaintiff sues: *B. & O. Rd. Co. v. May*, 25 Ohio St. 347.

Priorities.—Cases may arise presenting questions of precedence, where there are several creditors seeking to collect their claims by garnishment and otherwise. No process of garnishment can affect previously acquired liens or vested rights. Thus, where the property garnished is in the hands of a person who has a lien upon it for services rendered in relation to it, as, for example, for carrying it, the garnishee may insist upon his claim being first satisfied before the property is applied to the use of the garnishor. So where the property in the hands of the garnishee is subject to mortgages held by third persons, the property must be applied to their payment before it can be used to satisfy the garnishment. A garnishing creditor will not be permitted to take from the hands of another creditor assets which have been transferred by their debtor for that creditor's indemnity; and the court will determine the amount of indebtedness existing at the time of the decree, and will not confine itself to indebtedness existing at the time the answer was made: *Nolen v. Crook*, 5 Humph. 312. The receiver of a railway company holds the rents, issues and profits for the protection of the mortgagees; and creditors of the mortgagor cannot by attachment or garnishee process secure a more favorable footing than that held by the principal debtor: *New Port & Cin. Bridge Co. v. Douglass*, 12 Bush 673. Tolls received on a railroad after judgment rendered against the company and after the appointment of a sequestrator are not bound by such judgment so as to give it a preference

of payment out of them, consequently such tolls are subject of garnishment: *Leedom v. Plymouth Ry. Co.*, 5 W. & S. 265.

Evidence.—As before stated when a corporation is garnished it may answer by its proper corporate officer, so the officers and employees of the corporation are competent witnesses to testify as to an indebtedness or property sought to be garnished, but such corporate officers or agents must be those whose business it is to attend to the debt, claim or property in dispute. Thus a railroad company having been summoned as a garnishee, and a jury having been empanelled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant are not competent evidence, it not appearing that such engineer was an agent of the company having any authority on this subject, or that at the time of making the statements he was engaged as agent about the business referred to so as to make his statements part of the transaction and explanatory of the nature thereof: *Balt. & Ohio Rd. Co. v. Gallahue's Adm'r*, 12 Gratt. 655. After judgment has been rendered against the garnishee interest is chargeable upon money in his hands from the time of the demand made upon him for it: *Williams v. Androsscoggin Ry. Co.*, 36 Me. 201.

ADELBERT HAMILTON.

RECENT ENGLISH DECISIONS.

Court of Appeal.

BALLARD v. TOMLINSON.

There is no property in underground water percolating in unknown channels, but every landowner has, as incident to the ownership of the land, an unlimited right of appropriating such water in its natural state by lawful, even if artificial, means, and can maintain an action against any one interfering with that right by contaminating the water.

The plaintiff and the defendant were the owners of two wells, the water for which was drawn from the same strata. The water in the plaintiff's well rose by natural pressure, to within twenty-seven feet of the surface, whence he raised it by pumping. The water in the plaintiff's well was fouled by sewage discharged by the defendant into his well. *Held*, that the plaintiff was entitled to an injunction to restrain the defendant from using his well so as to pollute the water in the plaintiff's well, and also to damages for the injury which he had suffered by such pollution.

APPEAL of the plaintiff from the judgment of PEARSON, J.

The action was for an injunction to restrain the defendant from so using his well, as to pollute water in, or coming into, the plaintiff's well, and for damages for the injury caused by such pollution.

The facts were as follows :—

Since 1849 the plaintiff, a brewer at Brentford, drew water from a well sunk to the depth of 222 feet into the London clay, and bricked round. From the bottom of the well, a pipe was carried through the Thanet sand into the chalk, to a depth of 300 feet from the surface. From the sand and chalk, which were water-bearing strata, the water found its way, by natural pressure, into the well to within twenty-seven feet of the surface, whence the plaintiff raised it by pumping. About ninety-nine yards from that well the defendant had a well of similar construction and depth, and going down through the same strata, but the surface of the ground was ten feet higher than at the plaintiff's well. The evidence was that both wells were supplied from the underground water. The defendant made a drain by which sewage was discharged into his well, whence it flowed into the underground water, and thereby fouled the water in the plaintiff's well.

On these facts PEARSON, J., gave judgment for the defendant.

The plaintiff appealed.

Cookson, Q. C., *Webster*, Q. C., and *De Castro*, for the appellant.

Sir F. Herschell, S. G., *Warmington*, Q. C., and *Vaughan Hawkins*, for the respondent.

BRETT, M. R.—In this case the defendant was possessed of a well upon his own property, and, at one time he used it merely as a well, but afterwards he used the shaft of the well in a manner inconsistent with its being a well, and allowed sewage to flow into the shaft of that which had been a well. It cannot be denied that the shaft was artificial, and, therefore, the defendant had collected a quantity of sewage in an artificial reservoir. The plaintiff, at a distance from that—the distance being wholly immaterial—sinks a well to a lower level than the bottom of the defendant's artificial shaft. The sewage which was collected in the artificial shaft on the defendant's land has, by what the plaintiff has done on his own land, gone through or been drawn through, so as to get into the

percolating water, below the defendant's land. It is said, that if the plaintiff had done nothing with regard to his well, the sewage collected in the defendant's shaft would not have got into the percolating water beneath his land; or, if it had, that the water would have remained under his land; and, further, that, if it had got into the water below the defendant's well, it would not have got into the plaintiff's well, but for the mode in which he used the well. In the result, when the plaintiff used his own well by means of a pump, he drew into it the water which then came from the percolated water beneath his own well, and came there adulterated by the sewage, which had been in the artificial shaft on the defendant's land. It was clear that the water drawn up by the plaintiff into his well, was substantially adulterated and fouled. Then arises the question whether, in such circumstances, the plaintiff can maintain an action. The question is certainly in respect of water percolating in an unknown channel under the surface of the ground, and, to my mind, the depth makes no difference. It is clear law that no one has any property in percolating water below the surface of the earth, even whilst it is under his land. But it is equally clear that everyone has a right to appropriate that percolating water, at all events whilst it is under his land. No one has any property in it—no one has any right to have it come on to his land, but everyone has an unlimited right to appropriate it whilst it is under his land, and may take it all, so as to prevent it going on to the land of others. His neighbor also below him has an equal right, before the person above has taken and appropriated it, to take it all. He has a right to take it to the extent that he may cause the water of the land above to come upon his land and to take it so as absolutely to dry the land above. Therefore no one has any property in percolating water, but everyone has a right to appropriate the whole of it.

Then arises the question as to whether, in respect of such water, any of those persons has any rights whatever as against the others. I take it that this percolating water is a common reservoir or source in which no one has any property, but from which anyone has a right to appropriate any quantity. Then the question is whether anyone who has that unlimited right of appropriation, but has no greater rights than any of the others who have it, has a right to contaminate the common reservoir, or whether he is bound not to do anything which shall prevent, not only his immediate neighbors, but

any one of those who have that unlimited right, from obtaining its true value. It is said that the defendant in polluting this common source, did not pollute that in which the plaintiff had any property. That is true. If all the plaintiff can show is that the common source was contaminated, he cannot before he has appropriated any part of it, maintain any action in respect of the contamination. I do not think that a man can, by experimenting off or on his own land, and finding that the water was contaminated before it came on to his land, maintain an action, for the water did not belong to him, and he had not appropriated it. But it does not follow that he cannot maintain an action when he has appropriated it, and finds that the water which he had a right to appropriate, has been contaminated by that which another person has done to the common source; that is, although no one has any property in that source, yet inasmuch as everyone has a right to appropriate it, he has a right to appropriate it in the natural state, and no one has a right to contaminate the common source so as to prevent his neighbor having his right of appropriation.

The next point was that, assuming that to be true, yet, if the person who has that right of appropriation can only exercise it, or has done so by artificial means, to such an extent that if he had not used those means, the water he took would not have been contaminated, then the percolated water which he got, must be said to have been polluted by his act, and, therefore, he could not maintain an action. I cannot think that that is a true proposition. The question of natural, as distinguished from unnatural user never applies to a plaintiff. A man has a right to exercise that natural user with all the skill of which he is capable. That question is applicable to a defendant. Therefore, it seems to me, that as long as a plaintiff does not use any means which, as regards his neighbor, are unlawful, but only uses lawful means, however artificial or extensive those means may be, he has a right to use them, and the right to appropriate the common source is not diminished by reason of his using those means. Therefore, however he may appropriate the water from the common source, he has a right to have that source uncontaminated by any act of any other person. The question of natural or unnatural user only goes to this, that, although a defendant does contaminate water or anything else which goes on to his neighbor's land, yet, if that act is only the natural user of the land, then, although by that act he does injure his neighbor, he is

not liable, because otherwise he cannot use his land at all. I must say, further, with regard to this common source in respect of which a right of appropriation belongs to every one, the question does not depend upon persons being contiguous neighbors, but if it can be shown that in fact the defendant has contaminated the common source, it signifies not how far the plaintiff is from him, if it is proved that he has been injured by what the defendant has done. Therefore, upon this question which is not governed by authority, I cannot agree with the decision of the judge. The nearest case to the present is *Womersley v. Church*, 17 L. T. (N. S.) 190, which, I think, does show that the first proposition of the defendant's counsel was wrong. But I do not think that it governs the second point, which is glanced at in *Whaley v. Laing*, 2 H. & N. 476, to show that the effect of the plaintiff using artificial means does not prevent him exercising his right; but I confess that the second point requires less authority, and is less difficult than the other. I am of opinion that we must disagree with the judgment of PEARSON, J., upon the ground that no one has any property in percolating water, which, as it comes from a common source, every one has a right to appropriate, but no one has a right to injure.

COTTON and LINDLEY, L.JJ., delivered concurring opinions.

The decision of Mr. Justice PEARSON in the court below was founded upon the proposition that, "as the defendants were clearly entitled to pump every drop of water out of their well and leave the plaintiff with none, it would be no difference in principle if they deprived him of the water by rendering it unfit for use;" and similar views seem to have been entertained in *Upjohn v. Richland Township*, 46 Mich. 549; *Greencastle v. Hazelett*, 23 Ind. 186; *Brown v. Illius*, 27 Conn. 84.

The fallacy of this reasoning is abundantly shown by the judgments in the case on appeal. It does not follow that because I have a right to use a thing on my own land, I may lawfully send it into my neighbor's premises in a condition to work an injury to him.

And the case of polluting the water and allowing it to flow in its impure state

from the defendant's well itself into the plaintiff's well, is not unlike the case of drawing out the water by the defendants, using it for some purpose which contaminated it, and then discharging it on the surface, or elsewhere, where it flowed on to the plaintiff's premises and caused damage. The American cases, therefore, while recognising to its fullest extent the right of every landowner to use, detain, and even totally abstract all underground percolating water, as held in *Chase v. Silverstone*, 62 Me. 175; *Roath v. Driscoll*, 20 Conn. 533; *Wheatley v. Baugh*, 25 Penn. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; and many other cases, yet quite agree with the decision in *Ballard v. Tomlinson*, that he is liable for corrupting it, and thus causing injury to the well of an adjoining owner.

Thus in *Ball v. Nye*, 99 Mass. 584, FOSTER, J., says, "To suffer filthy

water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well or cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is itself an actionable tort." See also *Wahle v. Reinbach*, 76 Ill. 323; *Tate v. Parrish*, 7 T. B. Mon. 325; *Clark v. Lawrence*, 6 Jones Eq. 83.

It is on this ground that recovery is often had against gas companies for so affecting underground water as to injure the adjoining wells. See *Ottawa Gas Light Co. v. Graham*, 28 Ill. 73; s. c. 35 Id. 346; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Columbus Gas Light Co. v. Freeland*, 12 Ohio St. 392.

The ground of liability in all such cases is obvious and simple, and if the principle be kept steadily in mind it will lead to a satisfactory conclusion in them all. That principle is, that every man is bound to keep all his dangerous things and substance on his own premises at his peril; and if he fails to do so, and they escape and injure others, he is liable. Therefore it is, if his animals stray away and injure his neighbor's crops he is responsible. At common law he must keep them at home: *Rust v. Low*, 6 Mass. 94; *Thayer v. Arnold*, 4 Met. 589; *Tewksbury v. Bucklin*, 7 N. H. 518; *Little v. Lathrop*, 5 Greenl. 356; *Keenan v. Cavanaugh*, 44 Vt. 268.

If his falling wall crush his neighbor's shrubbery or fruit trees, the latter, as the more innocent of the two persons, has an undoubted claim to compensation: *Gorham v. Gross*, 125 Mass. 232, in which a very excellent opinion was given by GRAY, C. J.

If the roots from his fruit or shade trees penetrate the neighbor's soil and undermine his walls, or affect his well, the liability is clear: *Buckingham v. Elliott*, Sup. Ct. Miss., Feb. 9th 1885, 20 Cent. L. J. 496.

If the owner of a deadly upas tree,

or a yew, allows its limbs to extend over his division line, and the neighbor's cattle, browsing thereon, are poisoned, the owner of the tree must make the damage good: *Crowthurst v. Amersham Burial Board*, 4 Ex. Div. 5. And see *Lambert v. Bessey*, T. Raym. 421.

It is on the same ground that farmers are often liable for allowing fires to escape from their premises and consume their neighbor's fences or buildings: *Barnard v. Pbor*, 21 Pick. 378; *Higgins v. Dewey*, 107 Mass. 494.

So of snow falling from one's roof: *Shipley v. Fifty Associates*, 106 Mass. 194.

If noxious gases, fumes or odors escape from A.'s works and pass through the air to the injury of his neighbor's health, comfort or property, the latter's remedy is perfect: *St. Helen's Smelting Co. v. Tipping*, 11 H. of L. Cas. 642; s. c. 4 B. & S. 608; *Fay v. Whitman*, 100 Mass. 76; *Cooper v. Randall*, 53 Ill. 24; *Walter v. Selfe*, 4 DeG. & Sm. 315.

If one artificially accumulates a large body of water on his own land for his own benefit, and through this artificial pressure some of it escapes on to his neighbor's premises, and injures his well or floods his cellar, the party causing the injury is undoubtedly liable, whether it escapes by percolation, as in *Wilson v. New Bedford*, 108 Mass. 261; *Pirley v. Clark*, 35 N. Y. 520; *Snow v. Whitehead*, 24 Am. L. Reg. 230 and note; or by overflowing the surface, as in *Cahill v. Eastman*, 18 Minn. 324; *Gray v. Harris*, 107 Mass. 492; or by underground currents, as in *Fletcher v. Rylands*, L. R., 1 Ex. 265; s. c. 3 H. L. Cas. 330.

If by the use of powerful or dangerous chemicals, or other substances, A. corrupts and poisons a surface watercourse he is responsible to the party below who suffers thereby: *Merrifield v. Lombard*, 13 Allen 16; *Richmond Mfg. Co. v. Atlantic De Lain Co.*, 10 R. I. 106; *Stock-*

port Waterworks Co. v. Potter, 7 H. & N. 160; *Pennington v. Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769.

The reason in one and all is the same, he must not allow such things to escape from his own control and premises to another's detriment. Whether positive negligence must be proved in any or all the above illustrations is immaterial upon the precise point we are now considering.

The true cause of action therefore in *Ballard v. Tomlinson*, is not exactly that the defendants contaminated underground percolating water, but that he allowed

his impure sewage to escape from his premises to the plaintiff's, and the circumstance that it reached there by underground percolation instead of by a surface stream is quite immaterial. The mode of transmission is unimportant. In this view of the case the decision in *Ballard v. Tomlinson* is clearly right, and quite in harmony with well-established principles on both sides of the Atlantic.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Texas.

THE "EXPRESS" PRINTING CO. v. JOHN H. COPELAND.

When one becomes a candidate for public office, conferred by popular election, he is considered as putting his character in issue, so far as respects his qualifications for the office. Whatever pertains to the qualifications of the candidate for the office sought is a legitimate subject for discussion and comment, but statements and comments made must be confined to the truth, or what, in good faith and upon probable cause, is believed to be true, and the matter must relate to the suitability or unsuitability of the candidate for the office.

If the matter published be true, and is justified by the occasion, the candidate cannot recover against the publisher. If the matter be not justified by the occasion, then, whether true or false, the publisher is not relieved from liability, because the party was a candidate for public office; though the matter may be justified by the occasion. If it be false, a right of action accrues against the publisher, to defeat which the burden would be on him to show that publication was made in good faith, in the honest belief of its truthfulness, and that there were just and reasonable grounds for entertaining that belief.

In suits for libel, when defendant has asserted several inconsistent pleas in his answer, *inter alia*, one justifying by asserting the truth of the alleged libellous matter, the failure to establish such plea is not to be taken as tending to establish malice, and to aggravate the injury done defendant.

APPEAL from Bexar County.

This suit was brought by appellee against appellant, alleging that on January 7th 1883, appellee was a candidate for mayor of the city of San Antonio, the election for which was had January 8th 1883; that appellant published in its newspaper, the "San Antonio Express," a false, wicked and malicious libel, with the intent, and for the purpose of injuring him, to wit:

"As Mr. Copeland is a candidate for mayor, and as that officer has the general management of our finances, it is a legitimate question for the people to ask how he has managed affairs of others heretofore placed in his hands. We know very little of such transactions, though the records show one case that may give some valuable hints to the voters. We will state the facts, allowing the reader to make his own comments: In 1881 T. P. Aplin died, and Mr. Copeland was appointed administrator of his little estate, the total valuation of which was \$2579.90. The administration was closed November 23d, and the report shows a total expense of administering on the estate of \$2579.90 to have been \$882.28, and the administrator was allowed to retain the balance of the estate \$1777.62, subject to the order and instruction of the heirs. What such retention cost the heirs we do not know, but from the charges for administration it was doubtless a pretty heavy one. The heirs, no doubt, were afraid to give any instructions through fear that the balance of the estate would not pay the fees accruing for the money left in the administrator's hands."

Appellant answered by general and special exceptions and general denial, and specially denied the meaning attributed to the statement of appellee, and also that appellant published the statement believing it to be true; that the facts were furnished by others, who assured the appellant of their truth, and that the same was published in good faith, without any malice or ill-will against appellee, and under the honest belief that it was matter that was proper to be made known in view of appellee's candidacy for the office of mayor.

A trial had December 24th 1883, resulted in a verdict and judgment for \$2500, from which this appeal is prosecuted.

Simpson & James and Shook & Dittmar, for appellant.

J. H. McLeary, for appellee.

WATTS, J.—Elsewhere the rule seems well established that in this class of cases, where the defendant justifies by alleging the truth of the libellous matter, and fails to establish the truth of the plea, this may be considered as a circumstance tending to show malice. But our statute gives the defendant the right to plead in his answer, as many several matters, whether of law or fact, as he may deem necessary to his defence, and which are pertinent to his cause, pro-

vided that he shall file them all at the same time, and in the due order of pleading.

In *Fowler v. Davenport*, 21 Texas 633, in construing that provision of the statute, Justice ROBERTS remarks that "the general and absolute right here given to plead several matters is unlimited, if they are pertinent to the cause, filed all at the same time, and in the due order of pleading. There is no qualification or abridgment of this right in matters that are inconsistent. Such a qualification would destroy the right." The conclusion reached in that case was that one plea could not be used as evidence, or as an admission for the purpose of destroying another inconsistent plea contained in the same answer.

It would seem, therefore, that in this character of suits where the defendant has asserted several inconsistent pleas in the same answer, and among them one justifying, by asserting the truth of the supposed libellous matter, to permit that plea to be taken as a circumstance tending to establish malice, on the ground that the plea was not sustained by the evidence, when probable cause of the non-existence of malice has been asserted in the answer, and is pertinent to the cause, would, in the language of Justice Roberts, "destroy the right."

Here the court instructed the jury that appellant had pleaded the truth of the publication in justification, and if the truth of the publication had not been established by the evidence, then to consider the fact of its having been pleaded as a circumstance tending to show malice, and to aggravate the injury done to plaintiff. There exist two fatal objections to this instruction. First, there is no plea contained in the answer asserting the truth of the publication, as a defence: *Townshend on Slander and Libel*, sect. 357.

In the second place appellant had asserted by plea, that the publication was privileged, and made upon probable cause in good faith and without malice, so that in either view the charge is erroneous.

With respect to the question of privilege asserted by the answer, there is considerable confusion found in the adjudicated cases. Judge COOLEY, in his work on Torts, p. 217, says, "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public is concerned. With this end in view, not only must

freedom of discussion be permitted, but there must be exemption afterwards from liability for any publication made in good faith, and in the belief of its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for public office, either to the electors, or to a board of officers having power of appointment."

It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue, so far as respects his qualification for the office: *Com. v. Clap*, 4 Mass. 169; *Com. v. Odell*, 3 Pitts. (Pa.) 449; *Rearick v. Wilcox*, 10 West. Jur. 681; *Odgers on Slander and Libel*, sect. 236.

Whatever pertains to the qualification of the candidate for the office sought, is a legitimate subject for discussion and comment, provided such discussion and comment is not extended beyond the prescribed limit; that is, all statements and comments in this respect must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the issue; *i. e.*, it must relate to the suitableness or unfitness of the candidate for the office.

In our form of government, the supreme power is in the people; they create offices and select the officers. Then, in the exercise of this high and important power of selecting their agents to administer for them the offices of government, are the people to be denied the right of discussion and comment respecting the qualification, or want of qualification of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought? Usually it is by such discussion and comment concerning the qualification of opposing candidates that the people obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgment of this right of discussion and comment, beyond the limitations heretofore stated, it seems to us would be extremely unwise.

And in this respect the press occupies the same position, and should be included in the same category with the people. Public journals are supported by and are published with a view to the dissemination of useful knowledge among the people, and the comments

and discussions of these journals are entitled to the same privileges and subject to the same limitations respecting the qualifications and suitableness of candidates for office, as those of the people.

Chief Justice WILLIE, in *Belo & Co. v. Wren*, 5 Texas Law Review 153, truly remarked that every "facility should be allowed for the quick dissemination of useful facts, and the freedom of the press should not be restrained further than is absolutely necessary to protect private character from falsehood and slander."

It is implied by the rule announced by us that the matter published must be such as is justified by the occasion; that is, it must be such as would be appropriate for the electors to consider in making a selection for the office. Ordinarily that would be a question of fact, to be submitted to the jury by appropriate instructions.

Then, if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office, would not exempt the publisher from liability, whether the matter published was true or false. And although the matter published might be justified by the occasion, still, if it was false, a right of action would accrue against the publisher to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and besides that there were just and reasonable grounds for entertaining that belief.

While the rule here announced seems to be just to all, we are aware of the fact that it is not in accord with some, and perhaps a majority of the adjudicated cases in this country. In New York comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons. The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason, and not merely in accord with the spirit of constitutional liberty and free republican institutions.

Our conclusion is that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

The authorities upon the important principal case are not so harmonious as and interesting question discussed in the could be wished. In New York the rule

upon the subject is most unsatisfactory, and it is in effect held by the courts of that state that there is no privilege whatever possessed by the elector in canvassing the character and qualifications of a candidate for his suffrage beyond that which is possessed in any other relation. In the case of *Lewis v. Few*, 5 Johns. 1, the chairman of a public meeting signed an address adopted by the meeting, condemning the conduct of the governor, Morgan Lewis, then a candidate for re-election, which among other things charged him with want of fidelity to his party, pursuing a system of family aggrandizement in his appointments, signing the charter of a bank, knowing that it had been procured by fraud, attempting to destroy the freedom of the press by vexatious prosecutions, &c. In an action against the chairman for the libel contained therein, no attempt was made to prove the truth of the charges, and it was held by the Supreme Court that the publication was not privileged. Mr. Justice THOMPSON, in delivering his opinion, among other things, used this language: "That electors should have a right to assemble and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinion to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct, specific and unfounded crimes. It would in my judgment be a monstrous doctrine to establish that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes with impunity. Candidates have rights as well as electors, and these rights and privileges must be so guarded and protected as to harmonize one with another. If one hundred or one thousand men, when assembled together, undertake to charge a man with specific crimes, I see no reason why it should be less criminal than if each one

should do it individually at different times and places. All that is required, in the one case or the other, is not to transcend the bounds of truth."

A like doctrine was laid down in the case of *King v. Root*, 4 Wend. 113; s. c. 7 Cow. 613, which was an action by the lieutenant-governor, against the defendant for charging him with being intoxicated in the senate chamber as he was about to take his seat as presiding officer. The defendant upon the trial brought a number of witnesses who testified to the truth of the charge, which also appeared to have been published in the full belief of its truth; but the jury found against the defendant, and under an instruction that the only privilege the defendant had was simply to publish the truth and nothing more, found a large verdict for the plaintiff. The reader is referred for a full discussion of these cases to Judge Cooley's excellent work on Constitutional Limitations, page *435. See also *Curtis v. Mussey*, 6 Gray 261; *Aldrich v. Printing Co.*, 9 Minn. 133; *Hunt v. Bennett*, 4 E. D. Smith 647; s. c. 19 N. Y. 173. Note to *Munster v. Lamb*, 23 Am. L. Reg. (N. S.) 19; *State v. Balch*, 31 Kas. 465; *Briggs v. Garrett*, 41 Leg. Int. 14.

Without attempting any extended criticism of these cases, it may be remarked that the rule laid down therein affords no privilege whatever to the elector. The sentence first quoted taken alone would seem to concede some privilege to the elector; but taken in connection with what follows, it is deprived of all force. "There is nothing upon the record showing the least foundation or pretence for the charges. The accusation, then, being false, the *prima facie* presumption of law is that the publication was malicious; and the circumstances of the defendant being associated with others does not *per se* rebut this presumption."

It is to be observed that this is precisely the rule laid down by the books in actions for slander and libel, in cases

where there is no question of privilege involved.

The case of *Rearick v. Wilcox*, 81 Ill. 77, is similar in principle, in that it substantially negatives the privilege of publication; but it also discusses the measure of damages which was not passed upon in *Lewis v. Few*. In *Rearick v. Wilcox*, the plaintiff was a candidate for the office of police magistrate in the city of Quincy, and the publication complained of in substance charged dishonesty and corruption, and that, if elected, the candidate would improve "every opportunity for peculation that might by possibility attach to the office." No attempt was made upon the trial to establish the truth of these charges; and it was held proper to prove the facts and circumstances connected with the publication to show absence of malice in fact, and that such evidence was competent upon the question of exemplary damages, but not as affecting compensatory damages; that it was error to instruct the jury that they might in mitigation of damages consider the excitement of the election leading to the publication, or the fact that the article was published for the sole purpose of defeating the plaintiff's election; that the fact that the defendant, as the proprietor of a newspaper, was actuated by what he believed to be for the public good, could not be taken into consideration in mitigation of damages. In delivering the opinion of the court, CRAIG, J., said: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person, who is a candidate for office can be destroyed by the publication of a libellous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections."

Both this case and that of *Lewis v. Few*, make the gratuitous and unneces-

sary assumption than any other rule than that prevailing in cases where no privilege is claimed would "give to others a right to accuse him [the candidate] of any imaginable crimes, with impunity;" or that "the private character of a person who is a candidate for office can be destroyed by the publication of a libellous article," &c., which indeed would be "a monstrous doctrine." There would seem to be no great difficulty, however, in formulating a rule that will effectually protect the rights both of the public as represented by the electors, and the candidate, by simply shifting the burden of proof and making the case one of conditional privilege.

Another class of cases makes a distinction between comments on a man's public conduct or qualification for office, and upon his private character, the radical defect of which rule as is well observed by Judge Coolèy in his work on Constitutional Limitations (p. *440) consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing his public conduct. See *Gathercole v. Miall*, 15 M. & W. 331; *Commonwealth v. Morris*, 1 Va. Cas. 176; *Commonwealth v. Odell*, 3 Pitts. 449; *Commonwealth v. Clap*, 4 Mass. 163; *Sweeney v. Baker*, 13 W. Va. 158.

In the case of *Sweeney v. Baker*, *supra*, the rule is laid down as follows: "The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised, are not admitted, they must of course be proven. [It is to be observed that the truth is always a defence in a civil action for libel. Where then is the privilege?] But as respects his person there is no such large privilege of criticism though he be a candidate for such office. This large privilege of crit-

icism is confined to his acts. The publication of defamatory language affecting his moral character can never be justified on the ground that it was published as a criticism. His talents and qualifications, mentally and physically, for the office he asks at the hands of the people may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate falsely crimes, or publish allegations affecting his character falsely."

It is quite generally held that any false charge affecting the private character of a candidate for, or an incumbent of, an office is actionable. Thus, it has been held actionable falsely to charge an officer with having taken a bribe, or with corruption or want of integrity: *Hamilton v. Eno*, 81 N. Y. 116; *Wilson v. Noonan*, 35 Wis. 321; *Gove v. Blethen*, 21 Minn. 80; *Russell v. Anthony*, 21 Kan. 450; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Dole v. Van Rensselaer*, 1 Johns. Cas. 330.

So, falsely to charge an officer with having been intoxicated while in the discharge of his duties: *King v. Root*, *supra*; *Gottbehuet v. Hubachek*, 36 Wis. 515.

So, falsely to charge a sealer of weights and measures with "tampering with" and "doctoring" such weights and measures, has been held actionable: *Eviston v. Cramer*, 47 Wis. 659.

So, falsely to charge a city physician with having caused the death of a patient by reckless treatment: *Foster v. Scripps*, 39 Mich. 376.

In *Mayrant v. Richardson*, 1 Nott & McC. 348, it was held that to address letters to the electors of a district charging a candidate for the office of member of Congress with having an impaired understanding and a mind weakened by disease was presenting the subject to the

proper and legitimate tribunal to try the question, and was not actionable. In the case of *Spiering v. Andrae*, 18 Am. L. Reg. (N. S.) 186, however, the Supreme Court of Wisconsin criticise this case, and express the opinion that "the great preponderance of authority is that words charging an officer with gross ignorance and incapacity are actionable *per se*. In this case it was held actionable *per se*, to say of a justice of the peace, that he, the defendant, did not want to sit as a juror before such a d——d fool of a justice." It is worthy of remark that no attempt was made to prove the truth of the charge. This case as well as some of the preceding ones can be well distinguished from *Mayrant v. Richardson*, in that no question of privilege was raised in the case.

The case of *Mott v. Dawson*, 46 Ia. 533, seems to lay down a much more rational principle than any of the foregoing cases yet commented upon, excepting the principal case, and perhaps *Mayrant v. Richardson*, which latter so far as it goes, seems open to no criticism. In *Mott v. Dawson*, the court quote with approval Townshend on Slander and Libel, sect. 241, that "every one who believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such his belief to that other;" and accordingly held that where one in good faith and without malice, makes a charge affecting the character of another, who is a candidate for office, to an elector, shortly before the election, he is not liable to an action therefor, his statement being in the nature of a privileged communication. The charge in this case was of having cheated upon the sale of cattle, and directly affected the moral character of the candidate.

The case of *Briggs v. Garrett*, Court of Common Pleas Philadelphia, 41 Leg. Int. 14, though a *nisi prius* case, is one of great interest in this connection, hold-

ing substantially the doctrine laid down in the preceding case of *Mott v. Dawson*. See also *State v. Balch*, 31 Kans. 465, which, though a criminal prosecution, may be read with profit in this connection.

With reference to the principal case, we are glad to be able to say that it has our unqualified approval. In our opinion in adopting the quotation from page 217 of *Cooley on Torts*, as the rule of

decision, carefully limited as it is in the subsequent portions of the opinion, the learned judge who rendered the judgment of the court has placed his decision upon the solid basis of principle, and has established a precedent that ought to commend itself to every court called to pass upon similar questions in the future.

MARSHALL D. EWELL.

Chicago.

Supreme Court of New York.

FAIRLEE v. BLOOMINGDALE ET AL.

Under a statute empowering a married woman to carry on any trade or business on her sole and separate account, she is not authorized to enter into business in partnership with her husband, and the obligations of such a firm cannot be enforced against her.

MOTION for new trial.

Hiller & Krom, for the plaintiff.

Stevens & Mayhew, for defendants.

The opinion of the court was delivered by

WESTBROOK, J.—This cause was tried at the Schoharie Circuit in October 1883. The action was on a promissory note dated April 1st 1876, by which the defendants, who were, at the date of execution of the note, husband and wife, promised to pay "Elizabeth Fairlee (the plaintiff), or bearer, two thousand dollars, with interest, for value received." The note was signed "P. Bloomingdale," "F. M. Bloomingdale," and contained no clause charging the separate estate of the wife, who alone defended.

According to the testimony of the plaintiff, the consideration of this note was an old note, made by the same parties, for \$1300, and \$700 cash. She further testified that the wife, at the time the money was loaned and the note in suit given, stated they needed the money for goods, that she would see it paid, that she was as much interested in the business as her husband, and that the money was loaned by the plaintiff on the faith of such statement. She further said that the first note was executed by both defendants, that it was also for borrowed money, and that such first loan was upon a statement by the wife to the same effect as to her interest in the business with the one made by her when the note in suit was given.

The defendants, on the other hand, testified that they had never been partners, that the first note was signed by the husband alone, and that neither at the giving of the first or the second note was there any statement by the wife that she was interested in business with the husband.

The jury was charged that if the plaintiff loaned the \$700 on the representation of the wife, that she was interested in the business with the husband, she was entitled to recover the \$700, with interest; and if the wife had signed the first note, and the loan which the note evidenced had been made upon the faith of the wife's statement that she was interested in the business with the husband, then the plaintiff was also entitled to recover the amount of the first note included in the second; but that the plaintiff was not entitled to recover the amount of such first note unless it had been executed by the wife, and she had also, at the time of its delivery and execution, made the statement attributed to her.

The jury rendered a verdict in favor of the plaintiff for the whole amount of the note, with interest. The defendant—the wife—having made a motion for a nonsuit, which was refused, moves for a new trial upon the minutes, founded upon exceptions taken to the refusal to grant the nonsuit, and also to the charge as made.

The motion for a new trial presents this one question: Are the contracts of husband and wife, professing to be made by them as partners in business, enforceable against the wife?

The obligation upon which the action was brought, did not by its language expressly charge the separate estate of the wife. It was a joint and several promissory note in the ordinary form, signed by the husband and wife separately, by which they or either of them promised to pay the plaintiff or bearer, "two thousand dollars with interest, for value received." To recover upon such a note, therefore, as it was made long prior to the enactment of ch. 381 of the Laws of 1884, it was incumbent upon the plaintiff to show that it was given in or about a trade or business carried on by the wife, or that it was for the benefit of her separate estate: *Manchester v. Sahler*, 47 Barb. 155; *Bogert v. Gulick*, 65 Id. 322; *Yale v. Dederer*, 22 N. Y. 450; *Second Nt. Bk. of Watkins*, 63 Id. 639; *Nash v. Mitchell*, 71 Id. 199. That the note was for the benefit of the wife's business was sought to be established by her declaration made at the time of its execution and delivery, to the effect that she was equally interested with her husband in the business

which they were conducting. It was not pretended or claimed upon the trial that the business was the sole business of the wife, nor that she had any other connection therewith than as the partner of her husband. The case, therefore, presents sharply the question of the legal possibility of the existence of a mercantile partnership between husband and wife.

Such partnership, or any partnership between husband and wife, would certainly have been impossible at common law. The rule then was "the husband and wife are one person in law * * * the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything." 1 Bl. Com. 442. The legal conclusion, which the same author states as flowing from the unity of the persons of husband and wife, that the husband cannot covenant with the wife because it "would be only to covenant with himself," clearly forbade a partnership between them, which could only exist between persons having a separate legal existence and the one capable of contracting with the other. This rule of the common law is not questioned, but it is claimed that it has been abrogated by the statutes of this state, or at least so far abrogated as to permit the formation of a business partnership between them, and consequently the making of all agreements, contracts and covenants with each other upon which the existence of such a relation depends. Is this position sound?

The discussion of this question must begin with a recognition of the fact that our legislation has not entirely destroyed "the common-law unity of husband and wife, and made them substantially separate persons for all purposes." Per EARL, J., in *Bertles v. Nunan*, 92 N. Y. 152, see p. 159. The wife can only make such contracts as positive enactments allow. Her ability "to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute," *Id.* 160. With this recent and deliberate utterance of our court of last resort substantially repeated in a still later case (*Coleman v. Burr*, 93 N. Y. 17), before us, we must, to uphold a partnership between husband and wife, find a statute authorizing it.

Section two of chapter ninety of the Laws of 1860 is the provision relied upon to validate such an agreement. The act is enti-

tled "An act concerning the rights and liabilities of husband and wife," and the section referred to reads thus: "A married woman (1) may bargain, sell, assign and transfer her separate personal property, and (2) carry on any trade or business, and (3) perform any labor or services on her sole and separate account, and the *earnings* of any married woman, from her trade, business, labor or services, *shall be her sole and separate property*, and may be used or invested by her in her own name."

In determining the effect of this section a well recognised principle of interpretation must also be observed—that "it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the parliament has had that design, it is naturally said, they would have expressed it," Potter's Dwaris on Statutes 185.

The literal interpretation of the words of the statute is that the wife is thereby authorized to "carry on any trade or business, and perform any labor or services on her sole and separate account," and when the "trade or business" and "labor or services" are carried on or performed on her "sole and separate account," the earnings therefrom then, and only then, become "her sole and separate property."

Precisely this construction was given to the act by the court of appeals of this State in *Coleman v. Burr*, 93 N. Y. 17, see pages 24 and 25, that court saying: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each to the other remain as they were at common law."

In a partnership there can be no "separate property and business," and the "labor" performed by one partner in connection therewith cannot possibly be on the "sole and separate account" of the partner performing it. There must in every such case necessarily be a joint, and not a "separate property and business" and services on joint account, and not on the "sole and separate account" of one partner.

As, then, the unity of husband and wife at common law forbade

a business partnership between the two, as the common law has only been abrogated so far as express statutes have been clearly indicated an intent to abrogate, and as all statutes abrogating the common law must be strictly construed, it may well be asked, How can a statute which authorizes a wife to hold "separate" property and conduct a "separate" business, and which only gives to her the earnings for labor performed "on her sole and separate" account, be so construed as to authorize her to hold property jointly with her husband, carry on with him a joint business, and give to her earnings of labor which was performed on the joint account of both? The question carries with it its own answer. Very clearly the legislature of this state has not authorized and does not contemplate a business partnership between the two. To repeat the exact language of Judge EARL, in *Coleman v. Burr*, 93 N. Y. 17, 25, before quoted: "The statutes referred to touch a married woman in her relation to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each as to the other remain as they were at common law." This explicit utterance answers the question propounded, and is decisive of this case. The claim of the plaintiff is that these statutes go much further; that they cover and include a partnership between husband and wife, and relate to their joint property and business, and to the labor which she may perform on their joint account. The court of appeals, however, explicitly declares that they do not; that they touch a married woman in her relations to her husband only in so far as they relate to her separate property and business and the labor she may perform on her sole and separate account, while in all "other respects, the duties and responsibilities of each to the other remain as they were at common law." It is needless to add that if the relations between husband and wife are only changed so as to allow her to own a "separate" property and conduct a "separate business," and to receive the earnings from such "separate property and business," and from "the labor she may perform on her sole and separate account," then a partnership between the two cannot exist; for in such a case the property, business and labor must always be joint and not separate; and because joint and not separate, and therefore not covered by the statutes, the relations of husband and wife remain in regard

thereto as at common law, which forbade a business partnership between them.

Upon the trial of this cause at the circuit the counsel for the plaintiff relied upon the case of *Zimmerman v. Earhard & Dodge*, 58 How. 11, in the New York Common Pleas, which was then followed by the court, not, however, without grave doubts then expressed, as to its soundness, and which doubts have by subsequent examination and reflection been developed into a clear judgment that the opinion of BEACH, J., in that case cannot be sustained and should not be followed. It was an action brought by a husband and wife for goods sold by them as partners to the defendants. The sole defence was that the action could not be maintained by the two, because the relation of partners could not exist between them. The opinion referred to is to the effect that husband and wife may legally form a business partnership; but while the result therefrom (an affirmance of a judgment rendered for the plaintiffs in the court below) was concurred in by the other two judges (VAN BRUNT and LABREMORE), yet they were careful so to state and assign other reasons for such concurrence. The premise upon which Judge BEACH predicates his reasoning and conclusion is erroneous. Referring to *Adams v. Curtis*, 4 Lans. 164, he quotes therefrom as follows: "The effect and intent of the act (Laws of 1860, ch. 90) is to remove all the disabilities of coverture, so as to enable her to sue and be sued as to contracts, in all respects as though she was in fact unmarried." This, as a legal proposition, has been overruled by the court of appeals in the cases hereinbefore cited (*Bertles v. Nunan*, 92 N. Y. 152; *Coleman v. Burr*, 93 Id. 17), and therefore all reasoning based upon it must be equally unsound. "All the disabilities of coverture" have not been removed. The legislation of this state has only authorized her to own "separate" property, conduct a "separate" business, and receive wages for services rendered upon "her own sole and separate account." As to a joint property, joint business and joint labor, her relations to her husband remain as at common law. In this present status of the law is also to be found the answer to a further argument of Judge BEACH, that as the wife can employ the husband as an agent to conduct her separate business, therefore she may join the husband as a partner in business, as a partnership "is founded upon agency." The error in the reasoning consists in not bearing in mind the fact that he was arguing in regard to the ability of a person to contract,

who had no general power in that particular—one who could only make such contracts and agreements as express statute law clearly authorized. That person—a married woman—was authorized to own a “separate” property and to conduct a “separate” business, and was therefore empowered to employ an agent in its management or conduct. The agency maintained and perpetuated the separateness of the property and business, and was therefore not incompatible with the statute. When, however, the question relates to the formation of a partnership, the problem to be solved is not what ought a wife to be authorized to do further than is expressly permitted, because the legislation already had is based upon a certain principle which logically should be carried further; but it is, what does the language of the act expressly permit? Perhaps the law as it is should be carried farther, and allow a partnership between husband and wife. The propriety of such a thing is for the legislature and not for the courts. The former may, perhaps, change the common-law rights of husband and wife, and the latter cannot. They can decide that when the wife is authorized to carry on a “separate” business and own a “separate” property, she may employ an agent for that purpose; but they are as powerless to carry the principle involved in the legislation which conferred upon the wife power to own and conduct a “separate” business and property to the case of a joint business and property as they would have been to alter and change the common law in the particular which forbade that which the statute now permits. Innovations upon the common law are for those in whom the power to legislate is vested. What further should be done because of what has been done is for them. The courts declare what the law is, and whilst upholding and enforcing all legal legislative enactments, they must abide by the common law as it is, and not change its unrepealed forbiddings under the specious plea that they only carry out the spirit of an enactment. It is proper, sometimes, in construing a statute, to look at its spirit, but that principle does not authorize courts, when they can see that a certain reason has led to the enactment of a statute changing in some one particular the common law, still further in other particulars to alter and abrogate it. As the power to change or repeal is with the legislature, the rule of construction is that the statute was designed to go just so far, and no farther than its plain words declare. Least of all can it be assumed that legislation designed to separate the property of the

wife from that of the husband and to use it in a "separate" business, allows her to mingle her property with his, and subject it, through a partnership with him, to his control, his management and his contracts.

The conclusion of Judge BEACH in the case referred to is at variance with that of SEDGWICK, J., in *Chamboret v. Cagney*, 35 N. Y. Superior Ct. Rep. 474, 487, 488, and those of the courts in two other states. In Massachusetts, which has a statute containing a provision substantially identical with ours, it has been held in several cases (*Lord v. Parker*, 3 Allen 127; *Plummer v. Lord*, 5 Id. 460, and 7 Id. 481; *Knowles v. Hull*, 99 Mass. 562) that husband and wife cannot become partners in business. The reasoning of the court in these cases, and especially in the one first cited (3 Allen 127—see pages 129, 130) is well worthy of attention. The Massachusetts cases have also been recently followed in Indiana (*Haas v. Shaw*, 91 Ind. 384; *Scarlett v. Snodgrass*, 92 Id. 262), and in that state also a statute contains a provision very similar to ours. These authorities are of too high a character to be disregarded, and should certainly be followed by a trial judge in this state, when the reasoning by which they are supported commends itself to his judgment, and is in harmony with that of our own court of appeals.

It may, however, be said that the decisions referred to go beyond the present case, and forbid a partnership between a married woman and a person not a husband. This is conceded, and it is yet an unsettled legal problem in this state, whether or not any partnership of a married woman, previous to chapter three hundred and eighty-one of the laws of 1884 becoming a legal enactment, which removes all the disabilities of a married woman to make contracts, but does not "apply to any contract that shall be made between husband and wife," would be valid.

There are cases decided which seem to imply that such a thing is possible in this state, and there are others which imply a contrary doctrine. That question is not now determined. Certain it is that the words "separate" and "sole and separate" used in our statute in connection with the property, business and labor of the wife, must have some meaning. If they do not forbid a partnership in property, business or labor with all persons, because not permitting her to engage in a joint venture with any one, then they must refer to property, business and labor "separate" from the husband, held,

carried on and performed on "her sole and separate account" as distinguished from that in which he is interested. Without this construction, at least, of the words, they are meaningless, and with it the impossibility of the soundness of the position assumed by the plaintiff only becomes more apparent.

This opinion might, perhaps, well stop here, but I cannot forbear to allude to another argument based upon direct adjudications of the court of appeals. A valid agreement of partnership can only be made between individuals who are independent persons, and neither owing any duty to the other in regard to such business which shall make the enforcement of the partnership agreement impossible. Is this theory of mutual independence applicable to a wife who is about to embark in a business venture with her husband? In that business the husband at least is interested, and it is exceedingly difficult to determine what the wife owes to him as a duty in connection therewith, from which duty no agreement can absolve her and no partnership contract change. In *Coleman v. Burr*, 93 N. Y. 17, the case before referred to, it was held that the promise of the husband to compensate the wife for services rendered to a member of his family, and which services were confessedly meritorious, could not be enforced, for the reason that the wife, because she was a wife, owed these services to the husband. In *Whittaker v. Whittaker*, 52 N. Y. 368, it was decided that a note given by a deceased husband to a wife for services, a part of which was "out of door work on her husband's farm, could not be enforced against his estate." If the husband is unable to make a valid promise to pay the wife for services rendered to him, and which in one case were not household duties, upon what principle can a promise to give her one-half of the profits of his business, as a compensation for her services, be upheld? If the two can become partners, the husband who owns a business and has furnished its capital can, under pretence of compensating the wife for services rendered to him therein, make her his partner and divide with her its profits, though such help may be occasional and exceptional as that of the wife upon the farm in one of the cases above referred to. It is this inability of the wife to contract with the husband in regard to her services, which forms, and ever must form so long as the wife owes duties of service to the husband, a barrier to a business partnership between them. That relation, as has been before stated, can only exist when the parties to it are free to form such agreements as to

its profits as they may elect to make. This is vital to a partnership agreement, and the duty of service to the husband would oftentimes make his agreement with her incapable of enforcement. It is true we can conceive of bald instances of services which the wife would not be bound to render; but it is impossible to mark with accuracy the line where her duties as the husband's helpmate terminate. The pursuits and ventures of life are so numerous and variant, and the circumstances and conditions of married life so different, that it is impossible to lay down a rule which shall define the wife's duty of service with precision; and because it cannot be done, there can be no general power to form partnerships between husband and wife, which must cover every enterprise and venture of life, which are as various as the tastes and inclinations of parties and their situations and conditions in the world. If a partnership can exist between husband and wife in the mercantile business, it can in farming or in any other. It may begin with the marriage relation, follow it in every enterprise, and terminate only with the life of one or both parties. This radical change of the status of married persons, subverting in fact the whole social fabric, cannot be legally effected, for the reason before stated, that as the husband is unable to make a legal contract to compensate the wife for services rendered to him in and about his business, he cannot form a partnership with her, which necessarily must, in very many cases, at least, involve a promise to pay for services to which he is legally entitled as husband.

Perhaps the argument to show that husband and wife cannot become business partners is already complete; but two other points are entitled to some attention. First. By section eight of the act of 1860 (the one which it is claimed gives the power), it is declared: "No bargain or contract entered into by any married woman in or about the carrying on of any trade or business under the statutes of this state, shall be binding upon her husband, or render him or his property in any way liable therefor." It can hardly be supposed, that if the legislature supposed it had under that act, of which the provision just quoted forms a part, allowed a partnership between husband and wife, it would have inserted that clause in its present form, without any exception in favor of contracts made by the wife in regard to a business in which the husband was her partner. Second. While chapter 381 of the Laws of 1884 has removed, in general, all disabilities of a married woman to contract,

in its second section it has been carefully said : " This act shall not affect nor apply to any contract that shall be made between husband and wife." This section is certainly significant of legislative intent. If the aim and effect of past legislation were to remove " all the disabilities of coverture," as Judge BRACH assumed in *Zimmerman v. Earhard & Dodge*, why was the act of 1884 passed, and why were contracts between husband and wife exempted from its operation ? The passage of that statute is a legislative declaration that the wife did yet labor under some of the disabilities of coverture in the making of contracts ; and that as to the husband, these disabilities should still be maintained.

Having reached the conclusion that husband and wife cannot be partners in business, and that no contract made by the latter in regard to such business is enforceable against her, it is scarcely necessary to add that any declaration by the wife to the effect that she sustained that relation to her husband, is not binding upon her. In the making of contracts, all parties thereto are assumed to know the law. If the wife had made the direct statement that she was the partner of her husband, the plaintiff had no right to be deceived by it: *Brewster v. Striker*, 2 N. Y. 19. It is somewhat questionable whether or not the evidence of the plaintiff, if found to be true, necessarily justifies the legal inference that the wife thereby intended to assert the existence of a legal business partnership with her husband. Her declaration, if made, to the effect that she was equally interested in the business with her husband, was capable of another explanation, and perhaps it was erroneous to assume, as the court did in its charge, that if the jury found that such statement was made, they should find for the plaintiff. It would, perhaps, have been more accurate if the jury had been directed to find whether or not the defendant had thereby intended to assert that she was a partner in the business for which the money was loaned, and was so understood by the plaintiff to assert. Of that error, however, the plaintiff cannot complain. The case was submitted to the jury in the aspect most favorable to her. If, therefore, that which the plaintiff claimed the language evidenced could not legally exist, the plaintiff was not entitled to a verdict.

It is proper to state, in conclusion, that if any doubt existed in my mind in regard to the question discussed, the motion for a new trial would be denied. Careful study of each question has, however, brought me to the clear conviction that the plaintiff was not

entitled to recover against the wife, and that therefore a new trial should be granted.

Motion sustained.

The question of general interest decided in this case is that husband and wife cannot be partners in trade or business, because the statute means that she can only carry on trade or business when it is conducted on her sole and separate account—partnership not being so conducted, but carried on for the joint account of the copartnership. The other reason, that such partnership cannot be formed because the husband cannot contract to compensate his wife for her services in and about his business, is too remote and unsatisfactory to be considered.

The correctness of this decision depends upon the construction of the following law. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used or invested by her in her own name."

If this law means that a married woman is vested with three distinct and independent powers, viz., (1), to bargain, sell, assign and transfer her separate personal property: (2), to carry on any trade or business: (3), to perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate property, then the decision is not correct, because if a married woman is vested with the general power to carry on any trade or business, she can do it by means of a partnership as well as on her own individual account.

If on the other hand, this law means that a wife is vested with these powers to be exercised only for her sole and separate account, then the decision is correct.

In other words, does this statute mean, that for her sole and separate account, and for that only, she can deal with her personal property, carry on business, or perform labor; or do the words "on her sole and separate account" only refer to the words "perform any labor or services"?

An Illinois statute in substantially the same terms was construed to mean that a wife was empowered to enter into a copartnership: *Cookson v. Toole*, 59 Ill. 515; *Mitchell v. Carpenter*, 50 Id. 470; because if she can engage in business, she can do it by means of a partnership. In following the legitimate conclusions deducible from the decisions, *BLOOMER, J.*, in the case of *In re Kinkead*, 3 Biss. C.C. 410, said, that under the Illinois statute a wife can engage in trade, using her own property, and may bind herself by all contracts made in such business. She can own the whole stock, have all the profits and be liable for all the losses. If she can own the whole, she can own the half or any other share. "She can become a partner with another person, and why not with her husband. I can see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she can be a partner with any other person. The logical effect of the statutes and decisions in Illinois tend inevitably to this conclusion, and I can see no sound reason for stopping short of this point." This ruling was affirmed by *DRUMMOND, J.*

The Arkansas statute is substantially the same as the law above quoted, providing that any married woman may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate

property. and the decisions hold that this confers the powers of a *feme sole*: *Stillwell et ux. v. Adams*, 29 Ark. 350; *Hyner v. Dickinson*, 32 Id. 779; *Collins v. Wassell*, 34 Id. 30; *Countz v. Marklin*, 30 Id. 23; *Trieber v. Stover*, Id. 731; *Hershy v. Clarksville Inst.*, 15 Id. 128; *Collins v. Mack*, 31 Id. 685; on the ground that she has under the statute the absolute *jus disponendi*, and probably because other cases tend in the same direction: *Harding v. Cobb*, 47 Miss. 599; *Dibrell v. Carlisle*, 48 Id. 691; *King v. Mittalberger*, 50 Mo. 182; *Naylor v. Field*, 5 Dutcher 287; *Knaggs v. Mastin*, 9 Kas. 532; *Bressler v. Kent*, 61 Ill. 426; *Cole v. Van Riper*, 44 Id. 58; *Vandervoort v. Gould*, 36 N. Y. 639; *Brown v. Fifield*, 4 Mich. 322; *Williamson v. Williamson*, 18 B. Mon. 329; *Tillinghast v. Holbrook*, 7 R. I. 230.

The Kansas statute contains substantially the same provision, namely, that a married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings therefrom shall be her sole and separate property (Act March 31st 1868, § 4), and the courts held that this law constituted a married woman a *feme sole* with respect to such business: *Larimer v. Kelley*, 10 Kas. 298; *Tallman v. Jones*, 13 Id. 445; *Goings v. Orns*, 8 Id. 87; *Knaggs v. Mastin*, 9 Id. 532; *Furrow v. Chapin*, 13 Id. 107.

It may be doubted whether the Massachusetts statute is identically or substantially the same, or as broad as the law above quoted, yet the power to engage in partnership with her husband is denied, on the ground that it would destroy the separate characteristic of the wife's property which the statute creates, and subject her sole and separate property to her husband's control, which the statute prohibits: *Edwards v. Stevens*, 3 Allen 310; *Plumer v. Lord*, 7 Id. 481; although in *Lord v. Davison*, 3 Id. 131, she was allowed to recover her assigned partnership interest; and in *Reiman et al. v.*

Hamilton et ux., 111 Mass. 245, she was held liable for the contracts of her husband, made as master of a vessel, owned jointly by her and her husband, on the ground that this was not a case of copartnership, but of joint ownership with the management intrusted to one of the owners as general agent. See *Knowles v. Hull*, 99 Mass. 562, and *Todd v. Clapp*, 118 Id. 495, where it can be inferred that this ruling was made because the statute expressly prohibited copartnership business between husband and wife. This Massachusetts construction was adopted in Maine, because of the same statutory provision: *Smith v. Gorman*, 41 Me. 405; *McKeen v. Frost*, 46 Id. 239; *Dewelly v. Dewelly*, Id. 377.

The construction in Indiana was probably based on the statutory provision that husband and wife cannot contract with each other; *O'Daily v. Morris*, 31 Ind. 111; *Montgomery v. Sprankle*, Id. 113; *Haas v. Shaw*, 91 Id. 384; *Scarlett v. Snodgrass*, 92 Id. 262. The question was not considered in Alabama, probably because the statute prohibits such contracts: *Reel v. Overall*, 39 Ala. 138; nor could it arise in California, Colorado, Connecticut or Georgia, because the statute expressly empowers such business: *Kelly Cont. M. W.* 332-342; nor in Maryland, because the statute prohibits it: *Bradstreet v. Buer & Co.*, 41 Md. 19; Gen. Stat., art. 45, § 7.

The statute in Iowa is not, we think, any broader than the one above quoted, and yet the courts held that a married woman is a *feme sole*, with respect to this business: *Jones v. Glass*, 48 Iowa 345; *Smedley v. Felt*, 41 Id. 588; *Hamilton v. Lightner*, 53 Id. 470; *Laing v. Cunningham*, 17 Id. 510; *Russell v. Long*, 52 Id. 250; but see *Grant v. Green*, 41 Id. 88. The legal proposition advanced is, that a statute empowering a married woman to enter into, and carry on business on her sole and separate account, or to carry on business as a *feme sole*, does not authorize her to enter into a copart-

nership with her husband, nor to join her labor and capital to his in one and the same business enterprise, although she may do it with others. Partnership is one of the common methods of carrying on business, and in many enterprises the only method. If a married woman is empowered to engage in business, she is also empowered to enter into copartnership, because the former includes the latter. If this is true it should also follow that in the absence of fraud or a statutory inhibition, a wife can enter into copartnership in business with her husband.

A married woman's capacity to enter into, conduct and contract concerning, her separate trade or business, comes from three sources; first, her capacity as a *feme sole* trader; second, to conduct a separate business by agreement with her husband; and third, her power to carry on business under a statute expressly conferring that power. The first originated in the custom of London, and under it she was *sui juris* in every particular; she could sue and be sued, arrested and imprisoned for debt, and be declared a bankrupt: *Chit. Cont.* 178; 2 *Bright H. & W.* 77; 2 *Rop. H. & W.* 124; *Macq. H. & W.* 323. This custom was recognised in South Carolina, but restricted to certain limits; *McDaniel v. Cornuoll*, 1 *Hill* 428; *Robards v. Hutson*, 3 *McCord* 475; *Newbiggin v. Pillans*, 2 *Bay* 162; *Hobart v. Lemon*, 3 *Rich.* 131; *Brown v. Killingsworth*, 4 *McCord* 429; *Wilthaus v. Ludecas*, 5 *Rich.* 326. It was looked to as something of a precedent, in the Pennsylvania adjudications in construing the statute: *Burke v. Winkle*, 2 *S. & R.* 189; *Jacobs v. Featherstone*, 6 *W. & S.* 346; *Black v. Tricker*, 9 *Smith* 13; *Wilson v. Coursin*, 22 *Id.* 306, and see *Rhea v. Rhenner*, 1 *Pet.* 105. From the civil law is derived the capacity to become a sole trader having *sui juris*, powers, in Louisiana, California and the South Western Territory, originally colonized by the French or Spanish: *Christensen v. Shumpf*, 16 *La. Ann.* 50;

Guttman v. Scannell, 7 *Cal.* 455; *Reading v. Mullen*, 31 *Id.* 104; *Atwood v. Meredith*, 37 *Miss.* 635; *Oglesby v. Hall*, 30 *Ga.* 386.

The second method has always been upheld in equity, 2 *Story Eq. Jur.* § 1385 and cases cited in *Kelly Cont. M. W.* 155. The statutory method covers these methods which existed at the time of the enactment of the statute, but such statutes differ in most all the states, and the powers and obligations are correspondingly different. In some states these are prescribed by a court: *Moran v. Moran*, 12 *Bush* 303; *Wilkinson v. Cheatham*, 45 *Ala.* 341; and in others by a certificate of record: *Adams v. Knowlton*, 22 *Cal.* 289.

The power must be conferred, it is not inherent under the common law; *Woodcock v. Reed*, 5 *Allen* 207; and the extent of the power depends upon the grant: *Sammis v. McLaughlin*, 35 *N. Y.* 647; hence if the grant does not so prohibit, the husband can set his wife up in business, if he has no creditors at the time: *Mitchell v. Sawyer*, 21 *Ia.* 583; but the business must be a regular and continuous course of trading, and not an occasional act or fitful off and on, now and then transaction: *Holmes v. Holmes*, 40 *Conn.* 120; *Proper v. Cobb*, 104 *Mass.* 589; *Feran v. Rudolphsen*, 106 *Id.* 471.

Interpreting the statute by the equity doctrine and the custom of London, the rule is believed to be, that when a married woman is granted the power to carry on business, she has the power to make every contract and perform every act necessary or incident to that business, unless restricted unequivocally and expressly by such statute: *Adams v. Honness*, 62 *Barb.* 336; *Todd v. Lee*, 16 *Wis.* 482; *Petty v. Anderson*, 3 *Bing.* 170; *Foster v. Conger*, 61 *Barb.* 145; *James v. Taylor*, 43 *Id.* 530; *Abbey v. Deyo*, 44 *N. Y.* 343; *Draper v. Stouvenel*, 35 *Id.* 507; *Barton v. Beer*, 35 *Barb.* 81; *Klen v. Gibeay*, 24 *How. Pr.*

31; *Young v. Gori*, 13 Abb. Pr. 14, note; 42 Id. 311; *Manderback v. Mock*, 29
Chapman v. Briggs, 11 Allen 547. But Id. 43; *Hoffman v. Toner*, 49 Id. 231;
 it seems this is not the construction in *McGregor v. Sibley*, 69 Id. 388.
 Pennsylvania: *Robinson v. Wallace*, 39 JOHN F. KELLY.
 Penn. St. 133; *Wieman v. Anderson*, Bellaire, O.

Supreme Court of Missouri.

DESKINS v. GOSS.

A teacher in the public schools, in the absence of the establishment of any rule by the school board, has the right to adopt a rule to prevent his pupils using profane language, fighting or quarreling on their way to and from school, and may punish those infringing the rule by the use of the rod.

The opinion of the court was delivered by

NORTON, J.—This suit was brought to recover damages for alleged injuries inflicted by defendant on plaintiff in whipping him with a switch. The answer of defendant sets up that he was a teacher of the public school; that plaintiff was one of the pupils of said school, and that for a violation by plaintiff of a rule of the school, in using profane language, quarreling and fighting with the other scholars of the school, he did, in order to preserve good order and discipline in the school and to promote its usefulness, chastise plaintiff with a switch, inflicting upon him reasonable and moderate punishment.

Plaintiff obtained judgment for \$9, from which the defendant has appealed. On the trial plaintiff offered evidence tending to show that the punishment inflicted was excessive; that plaintiff did not use profane language to, or quarrel or fight with the other scholars. The defendant offered evidence tending to prove the facts set up in his answer, and the following agreed statement of facts was then read to the jury, viz: "That the defendant was at the time the employed teacher of the public school at which the plaintiff was a regular daily attendant on and during the day that the acts and conduct complained of occurred, and for which the defendant chastised him; that the profane language used, the quarreling and fighting was done, if at all, one-half or three-fourths of one mile from the schoolhouse, after the school had been adjourned for the day and the scholars were on their way to their respective homes, and before they had reached them, and the punishment was inflicted the next day thereafter, when the plaintiff returned to the

school ; that the defendant, as teacher, had a standing rule against the use of profane language, quarreling or fighting among the scholars, either at the school house or on their way home, and often spoke of the rule in the presence of the school and the plaintiff; that plaintiff was, at the time of the chastisement, 13 years of age, and that all this occurred in the county of Grundy, Mo."

The court then instructed the jury that under the evidence and pleadings the jury must find for the plaintiff, and refused to give several instructions asked by the defendant, to the effect that plaintiff while in attendance as a scholar was under the control of defendant as teacher, and that defendant had a right to punish him for an infraction of the rule put in evidence in the agreed statement of facts, and that the verdict of the jury should be for defendant unless they believed that the punishment inflicted was unreasonable or excessive.

It is this action of the court which is complained of as error, and we are of the opinion that the complaint is well founded. While it is provided in section 7045, Revised Statutes, that "the school board shall have power to make all needful rules and regulations for the government of the school in their district," if they failed to do so, the right of the teacher employed to conduct the school to adopt reasonable rules to promote good order and discipline arises out of the very nature of his employment, and the only question worthy of consideration which this record presents is, was the rule which forbade the use of profane language, quarreling or fighting among the scholars, either at school or on their way home, reasonable and promotive of good order and proper discipline of the school. It must be conceded without question that the rule, in so far as it forbade such acts on the part of the scholars while at school, was not only reasonable but necessary to the orderly conduct of the school.

But it may be insisted and doubtless was urged before the trial court, that so soon as the scholars were dismissed from school by the teacher his authority over them ceases, and that of the parent is resumed, and that therefore that portion of the rule which forbids such acts as are therein mentioned, while the scholars are on their way to their homes, is without sanction or authority. We are unwilling to go to this extent, believing it to be unsupported either by reason or weight of authority.

In the case of *Dritt v. Snodgrass*, 66 Mo. 286, this court went

to the extent of saying that when the pupil of a public school is released and sent back to his home, neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye. This court also, in the case of *King v. Jefferson City School District*, 71 Mo. 628, sustained the validity of a rule which provides that "any pupil absent six half days in four consecutive weeks, without satisfactory excuse, shall be suspended from school." In that case a pupil had played the truant and thereby become amenable to the operation of the rule and was expelled, and this court refused to interfere on the ground that the rule was a reasonable one. Truancy is an act committed out of the school-room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion.

If the effects of acts done out of the school-room while the pupils are returning to their homes, and before parental control is resumed, reach within the school-room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden and punishment inflicted on those who commit them: *Burdick v. Babcock et al.*, 31 Ia. 562-7; *Lander v. Seaver*, 32 Vt. 114; *Sherman v. Inhabitants of Charleston*, 8 Cush. 160.

The effects of the scholars using to and with each other obscene and profane language, quarreling and fighting among themselves on the way to their homes, would necessarily be felt in the school-room, engender hostile feelings between scholars, arraying one against the other as well as the partisans of each, and destroying that harmony and good-will which should always exist among the scholars who are daily brought in contact with each other in the school-room.

For the error committed in giving the plaintiff the first and second instructions and refusing those asked by the defendant, numbered two, three, four, five and seven, the judgment will be reversed and cause remanded. All concur.

By the old authorities it is said that the authority as to punishment of a teacher over a pupil is the same as that of the parent over the child: 1 Hawk P. C. (6th ed.) sect. 23; Bac. Abr. tit. *Assault and Battery*, C.; Pulton de Pace, 6 b. And some of the modern authori-

ties adopt this view: 1 Bish. Crim. L. (4th ed.) sect. 771; see *Fitzgerald v. Northcote*, 4 F. & F. 656; *Starr v. Lift-child*, 40 Barb. 541; *Commonwealth v. Seed*, 5 Clark P. L. J. 78. But such a broad rule has not gone unquestioned, even by the eminent commentators on the

laws of England : 1 Black. Com. 453 ; see Chitty's note ; *State v. Burton*, 45 Wis. 150 ; s. c. 30 Am. Rep. 706 ; 18 Am. L. Reg. 233 ; *Lander v. Seaver*, 32 Vt. 114. In this latter case it was said : "The parent, unquestionably, is answerable only for malice or wicked motive, or an evil heart in punishing his child. This great, and to some extent, irresponsible power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. * * * This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning. The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise."

In another case it was said : "The law having elevated the teacher to the place of the parent, if he is still to sustain that sacred relation, it becomes him to be careful in the exercise of his authority, and not make his power a pretext for cruelty and oppression. Whenever he undertakes to exercise it, the cause must be sufficient, the instrument suitable for the purpose ; the manner and extent of the correction, the part of the person to which it is applied, the temper in which it is inflicted, all should be distinguished with the kindness, prudence and propriety which becomes the station : ' *Cooper v. McJunkin*, 4 Ind. 290.

In Massachusetts, the court refused to instruct the jury "that a school teacher is amenable to the law in a criminal prosecution, for punishing a scholar, only when he acts *malò animo*, from vindictive feelings, or under the violent impulses of passion or malevolence ; that he is not

liable for errors of opinion or mistakes of judgment merely, provided he is governed by an honest purpose of heart to promote, by the discipline employed, the highest welfare of the school and the best interest of the scholar ; that he is liable in a criminal prosecution for punishing a scholar only when the amount of punishment inflicted is more than adequate to subdue the scholar and secure obedience to the rules of the school." This action of the court was held to be unobjectionable ; and the following in substance was held to state the law correctly : "That a teacher had a right to inflict punishment upon a scholar ; that the case proved was one in which such punishment might properly be inflicted ; that the instrument used (a ferrule) was a proper one ; that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion, and must be governed, as to the mode and severity of the punishment, by the nature of the offence, by the age, size and apparent power of endurance of the pupil ; that the only question in this case was whether the punishment was excessive and improper ; that if they should find the punishment to have been reasonable and proper, the defendant could not be deemed guilty of an assault and battery ; but if upon all the evidence in the case they should find the punishment to have been improper or excessive, the defendant might properly be found guilty upon this complaint : ' *Commonwealth v. Randall*, 4 Gray 36. A like conclusion was reached in Vermont, except that if there was any reasonable doubt whether the punishment was excessive, the teacher should have the benefit of the doubt : *Lander v. Seaver*, 32 Vt. 114.

The rule, however, is well established that the teacher has the right to chastise his pupil moderately ; and whenever the correction as confessed by the pleadings, or as proven at the trial, appears clearly to have been excessive or cruel, it must be adjudged illegal : *Anderson v. State*, 3

Head. (Tenn.) 455; *Burlington v. Essex*, 19 Vt. 91; *Commonwealth v. Seed*, 5 Clark P. L. J. 78; *Morris's Case*, 1 City Hall Rec. 52; *Starr v. Lifestchild*, 40 Barb. 541; *Link v. Bell*, 3 Quarterly L. Jr. 92; *State v. Mizner*, 45 Iowa 248; s. c. 50 Id. 145; s. c. 43 Am. Rep. 128.

If no rule of the school board prevents it, the teacher may punish the pupil within the bounds prescribed by law, even though he has an instruction from the father that the child must not be punished: *State v. Van Strang*, 3 Tenn. L. Rep. 19.

In case the punishment is proper the father is not excusable if he assault the teacher because of it: *Morris's Case*, 1 City Hall Rec. 52.

A pupil beyond the school-age is subject to punishment as any other pupil: *State v. Mizner*, 45 Ia. 248; s. c. 24 Am. Rep. 769; *Stevens v. Fassett*, 27 Me. 266.

The teacher is not confined to mere whipping; he may impose a reasonable restraint upon the person of the pupil, either by way of prevention or punishment of disorderly conduct: *Fitzgerald v. Northcote*, 4 F. & F. 656; Cooley on Torts 171.

The teacher is the absolute judge of the kind of punishment, with the limitation that it must be reasonable and usual, and not destructive of the object of the relation, or subversive, of the contract under which the relation exists: *Starr v. Lifestchild*, 40 Barb. 541; see *Butler v. McLellan*, Ware 219, 230.

The object and design of punishment must always be kept in view. These have been stated as follows: "The legal objects and purposes of punishment in school are like the objects and purposes of the state in punishing a citizen. They are threefold: first, the reformation and the highest good of the pupil; second, the enforcement and maintenance of correct discipline in schools; and third, as an example to like evildoers: *State v.*

Mizner, 50 Ia. 145; s. c. 32 Am. Rep. 128.

No punishment is justifiable unless it is inflicted for some definite offence which the pupil has committed; and the pupil must understand what he is being punished for. If he does not know why the punishment is inflicted, the act is unlawful; it is subversive and not promotive of the true object of punishment, "and cannot be justified:" *State v. Mizner*, *supra*.

In the absence of proof the law presumes that a teacher punished his pupil for a reasonable cause and in a moderate and reasonable manner. This presumption, like all other legal presumptions, may be rebutted by proof: *State v. Mizner*, 50 Ia. 145; s. c. 32 Am. Rep. 128; *Hathaway v. Rice*, 19 Vt. 102.

The teacher has the right to show that the chastisement was reasonable, and for misconduct in school: *State v. Mizner*, 45 Ia. 248; s. c. 24 Am. Rep. 769.

In one case, in speaking of the extent of the punishment, it was said: "The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced in itself immoderate, as not only being unnecessary for, but inconsistent with, the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain only, and no permanent ill, cannot be so pronounced, since it may have been necessary for the reformation of the child, and does not injuriously affect its future welfare. * * * When the correction administered is not in itself immoderate, and not, therefore, beyond the authority of the teacher, its legality or illegality must depend entirely on the *quo animo* with which it was administered. Within the sphere of this authority the master is the judge when correction is required, and of the degree of correction necessary;

and like all others intrusted with a discretion he cannot be made penally responsible for error of judgment, but only for wickedness of purpose:" *State v. Pendergrass*, 2 Dev. & Bat. 365. In another case it was held in order to hold a teacher liable for chastising a pupil, the circumstances must show a strong reason to believe that he was actuated by bad and malevolent motives, using his legal authority for the gratification of a mind bent on mischief: *Commonwealth v. Seed*, 5 Clark P. L. J. 78.

Where a person took a child into his house to instruct, agreeing to instruct and protect him, and provide for his physical wants, he was, it was held, not entitled to turn him out into the street, withdraw his care and protection, and deny him the shelter and comfort of his home under the name or form of punishment. Such a mode of punishment was deemed neither reasonable nor usual: *Starr v. Lifchild*, 40 Barb. 541.

Two boys, attending a Catholic school, were absent one day, without leave, to attend the funeral of a Protestant child. The fathers of the boys ascertained that the superintendent of the school intended to whip the boys for attending the funeral, and they requested him not to punish them for that reason. On the boys returning to school, the teacher having them in immediate charge, required them to give an excuse for their absence from school without permission, on the day of the funeral, and on their refusal to give excuses, she gave them a note and directed them to take it to the superintendent's house, about fifty steps from the schoolhouse. As soon as they were outside of the schoolhouse they ran home and never delivered the note. The next day the superintendent entered the schoolroom and whipped the two boys, declaring at the time that the whipping was not for going to the funeral, but for their disobedience of the order of the teacher in charge requiring them to take and deliver her note to him. It was held

he, as defendant in an action for assault and battery, was not liable to a fine for such action on his part: *Danenhoffer v. State*, 69 Ind. 295, 418; s. c. 35 Am. Rep. 216. On the second trial of the case it was held that he had a right to show that the administering of the punishment had nothing to do with the going to the funeral: *Danenhoffer v. State*, 79 Ind. 75.

In a Vermont case it was held that excessive punishment could not be justified from the fact that the teacher acted in good faith and without malice, honestly believing the punishment was necessary for the discipline of the school and the welfare of the pupils: *Lander v. Seaver*, 32 Vt. 114.

Where the teacher beat the pupil, with the consent of the father, so severely that the latter died it was held that he was guilty of manslaughter: *R. v. Hopley*, 2 F. & F. 202.

If compulsory education has not been adopted by the legislature, the board of education, in the absence of an express statute, has no power to require a pupil to pursue a particular study in opposition to the father's desire; and a teacher is not justified in punishing the pupil for refusing to pursue the particular study: *Rulison v. Post*, 79 Ill. 567; *Morrow v. Wood*, 35 Wis. 59; s. c. 13 Am. L. Reg. 692; *State v. Migner*, 50 Ia. 145; s. c. 32 Am. Rep. 128. But a requirement by the teacher that a pupil in a grammar school must write English compositions was held reasonable; and on a refusal by a pupil, in the absence of any direction by the parent, to comply with the requirement it was also held he could be expelled by the teacher on that account: *Guernsey v. Pitkin*, 32 Vt. 224. The board of directors may adopt such a rule: *Sewell v. Board of Education*, 29 Ohio St. 89.

In the absence of any rule of the school board, or of a statute, a teacher has the power to suspend a pupil for good cause from the privilege of the school. It is

essential that the teacher should have such power, in the absence of the action of the board, to maintain order and discipline. He is responsible for the discipline of the school, and for the progress conduct and deportment of his pupils. "It is his imperative duty to maintain good order and require of his pupils a faithful performance of their duties. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils:" *State v. Burton*, 45 Wis. 150; s. c. 30 Am. Rep. 706; 18 Am. L. Reg. 233. For this reason he has the power, under the limitations named, to suspend a refractory pupil. "The conduct of a recusant pupil may be such that his presence in the school for a day or an hour may be disastrous to the discipline of the school, and even to the morals of the other pupils. In such a case it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privilege of the school; and he must necessarily decide for himself whether the case requires that remedy. If he suspends the pupil, he should promptly report his action and his reason therefor, to the proper board:" *State v. Burton*, *supra*. Yet a pupil cannot be suspended or expelled unless authorized by statute, either by the teacher or board of directors, except "for disobedient, refractory, or incorrigibly bad conduct:" *Rulison v. Post*, *supra*; *State v. Burton*, *supra*; and perhaps a teacher has no power to *expel* him. Upon suspension the teacher may at once remove him from the school room, using such force as is necessary; and he may call others to his aid, who may use a like force: *Stevens v. Fassett*, 27 Me. 266.

A recent ruling of the Supreme Court of Wisconsin will illustrate many of the above statements. The board of educa-

tion of a city established a rule requiring each pupil, when returning to school after recess, to bring into the school room a stick of wood for the fire. This rule was held void, because not "needful for government of the schools" within the meaning of the statute clothing the board with its powers: *State v. Board of Education*, ante, page 601.

It is often a question with teachers, pupils and parents how far the authority of the teacher extends when not at, or in the immediate vicinity of, the school-room or house. In practice and in principle he has the same control during school hours over the pupils while in the school house or in the school yard, or in the immediate vicinity, so long as he is not on the parent's own immediate place of residence, that he has in the school-room. In Vermont, it was decided that the teacher has supervision and control over the pupil from the time he leaves home to go to school until he returns home from school. This is a reasonable rule. It designates the point of time where the parent delivers the charge of the pupil over to the teacher, and where the latter yields it back to the parent. It is often necessary to the discipline of the school that the teacher should have such a control. Yet in this case it was also held, although the teacher had no general right to punish a pupil for misconduct committed after the dismissal of school for the day and the return of the pupil to his home, yet he might, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which had a direct and immediate tendency to injure the school and subvert the master's authority: *Lander v. Seaver*, 32 Vt. 114. See *Murphy v. Board of Directors*, 30 Ia. 429, a case based on a statute.

In the Missouri decision, *Dritt v. Snodgrass*, 66 Mo. 286; s. c. 27 Am. Rep. 343, cited in the principal case, the statute gave the board of directors "power to make and enforce all needful

rules and regulations for the government, management and control of such schools and property as they think proper, * * * not inconsistent with the law of the land." A board had adopted a rule that no pupil should, during a school term, attend a social party. A pupil of the school, with the permission of his parents, violated this rule, and was expelled by the board for so doing. It was said that the directors had no power to follow the pupil

home and govern his conduct while under the eye of his parent, and that the rule invaded the power and right of the parent. This point, however, was not directly decided; but it was held that as no malice, oppression, or wilfulness was shown on the part of the directors, they were not liable in damages.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Minnesota.

TIERNEY v. MINNEAPOLIS & ST. LOUIS RAILWAY CO. ET AL.

It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to these obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence.

By a regulation governing the employees in the transfer-yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and if out of repair to mark them "in bad order," indicating that they were to be sent to the "repair track." *Held*, that negligence on the part of the inspectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company.

It will not be presumed under such circumstances that the plaintiff assumed the risk of such negligent inspection, unless it appear that he undertook to handle cars in the course of his employment without reference to inspection.

MITCHELL, J., dissents, on the ground that the car inspector was a fellow servant with the employees engaged in making up the train.

A witness who is not an expert may testify to facts within his knowledge and observation in reference to the health and physical condition of an injured perron.

APPEAL from an order of the District Court, Freeborn county, denying motion for new trial.

Lovely & Morgan, for respondent.

J. D. Springer and *Whytock & Todd*, for appellants.

The opinion of the court was delivered by

VANDERBURGH, J.—It is admitted that the defendants jointly owned, maintained and occupied a yard in common at Albert Lea, where trains were made up to be sent over their respective lines. The respondent had charge of the making up of night trains in the yard, and was injured in the course of his employment, while

coupling cars, at about 3 o'clock in the morning of November 24th 1882. A freight train had previously arrived from Minneapolis over the Minneapolis & St. Louis road, including, with others, a box car loaded with flour at that place and bound east. On its arrival, it became plaintiff's duty, according to the usual course of business, to obtain a list of the cars and their destination, so that he might proceed to make the necessary transfers in making up the outgoing trains. It was the duty of the car inspectors, two of whom were employed for night service, to inspect all cars in trains on their arrival. The plaintiff had been in the employ of defendants a little more than two weeks, and must have been familiar with the manner in which the business was carried on in the yard. On the night in question, about half an hour after the arrival of the train mentioned, the plaintiff, who had been switching and distributing cars, brought an unloaded flat car from the wood track to the main track, upon which the box car we have referred to still stood, and undertook to couple them. His evidence tends to show that as he went to make the coupling, and while the cars were coming together in the usual way, the draw-bar of the flat car struck and overrode the draw-bar of the box car, which appeared to be loose and insecurely supported, and dropped down when struck by the approaching car, thus permitting the two cars to come together and intercept the plaintiff, and resulting in his being run over upon the track, and in causing the loss of a leg, which was necessarily amputated above the knee.

While it may be conceded, for the purposes of this case, that from the circumstances and nature of plaintiff's employment, in which cars from many roads were brought together with coupling attachments of different heights and patterns, he would assume the ordinary risks of the service from such causes, we think, upon the evidence, the question was fairly for the jury whether the accident occurred from such causes, or from the fact that the draw-bar of the box car was insecurely supported and in an unsafe condition, from neglect to repair the same. Upon this issue the evidence in plaintiff's behalf, among other things, tended to show that the strap or carrying-iron which supported the draw-bar was worn, weak, and loose, and that some of the bolts which were intended to keep this iron strap in place were loose or broken, that it had been out of repair for a considerable time, and the defects were such as could readily be discovered by proper inspection.

The evidence of the defective condition of the car, which appears to have been previously in the possession of one of the defendants, the Minneapolis & St. Louis Company at Minneapolis, and during its transit to Albert Lea, a distance of 108 miles, was received and submitted to the jury without any objection or suggestion that the liability did not attach equally to both defendants for any negligence in respect to this car prior to its arrival at Albert Lea. This point is now suggested for the first time; but we think, under the circumstances, the attention of the court should have been called to this matter when the evidence was received, or when the jury were instructed. As the case stands, since we think there was evidence for the jury tending to show a joint liability for negligence in the yard at Albert Lea, it is too late to raise the question in this court as to the competency or sufficiency of the evidence of previous negligence to charge the defendants.

Evidence was received, under the defendant's exception, showing a regulation of defendants in relation to the inspection of cars, under which it became the duty of the car inspectors, if any were found defective or in need of repairs, to mark them so as to indicate that they were in bad order, and hence not to be sent out, but to be sent to the repair track. We think this evidence was properly received upon the question of defendants' liability; for if the car in question was defective and unsafe, which, as we have seen, was for the jury, then such regulation was binding upon the inspectors as representing the defendants for the protection of employees in the yard, unless it should appear that it was one of the risks of the service assumed by them to handle cars there without regard to inspection, or their condition, or any notice thereof. It may have been a question for the jury, under proper instructions, to determine whether or not, from the nature of the service in which the plaintiff was employed, he was required to proceed to switch cars and make up trains without regard to inspection, and without waiting for it; but instructions of this character were not asked or given, and the evidence does not show that such risk necessarily attached to plaintiff's business, and was hence assumed by him.

The position taken by defendants' counsel at the trial appears to have been that the plaintiff did not give the inspectors the necessary time to complete their work; and the case was submitted to the jury under instructions given, at defendants' request, that "if

he did not do so," or "if he did not know or have reason to believe that all the cars in said train were inspected before he caused them to be moved, he cannot recover." This question was determined by the jury in plaintiff's favor upon the evidence.

As before remarked, it was the duty of the inspectors to examine cars immediately upon their arrival, and the evidence tends to prove that it was their practice to so inspect them upon the track before their removal. The inspection of the train was, in fact, so made on the night in question. There is some conflict in the testimony as to the length of time it would take to properly inspect such a train of cars, and it does not clearly appear how much time had elapsed before the injury; the plaintiff's recollection being that it was from twenty-five to forty minutes. But it appears that the inspectors had, in fact, completed their work before the accident. The negligence of the inspectors was therefore proper to be considered upon the question of the defendants' liability. If it is the duty of the corporation to exercise reasonable diligence to supply suitable and safe instrumentalities for the use of its servants to work with, it is also its duty to use like diligence to keep the same in proper repair. This necessarily involves inspection and examination as incident to the obligation to repair, and, as a corporation must necessarily act through agents, the negligence of its employees in the discharge of such duty is attributable to the corporation: *Solomon Rd. Co. v. Jones*, 30 Kans. 601; *Railroad Co. v. Holt*, 29 Id. 149; *Brann v. Rd. Co.*, 53 Iowa 595; *Porter v. Rd. Co.*, 71 Mo. 77, 78; *Railroad Co. v. Jackson*, 55 Ill. 492; *Condon v. Missouri Pacific Rd. Co.*, 78 Mo. 567; *Crispin v. Babbitt*, 81 N. Y. 521; *Fuller v. Jewett*, 80 Id. 52, 53; *Kirkpatrick v. Rd. Co.*, 79 Id. 240; *Slater v. Jewett*, 85 Id. 70, 71; *Durkin v. Sharp*, 88 Id. 227; *Murphy v. Rd. Co.*, Id. 152; *Dana v. Rd. Co.*, 92 Id. 642; *Vosburgh v. Rd. Co.*, 94 Id. 380; *Kain v. Smith*, 25 Hun 149; *Wedgwood v. Rd. Co.*, 41 Wis. 483; s. c. 44 Id. 48, 49; *Smith v. Rd. Co.*, 42 Id. 526; *Richardson v. Great Eastern Rd. Co.*, L. R., 1 C. P. Div. 342.

In *Fuller v. Jewett*, *supra*, it is said by the court: "The duty of maintaining machinery in repair for the safety of employees is the same in kind as the duty of furnishing a safe and proper machine in the first instance;" and "in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who

sustains the injury." This corresponds to the language of the same court (CHURCH, C. J.) in *Flike v. Rd. Co.*, 53 N. Y. 553, and (FOLGER, C. J.) in *Slater v. Jewett*, 85 Id. 70, 71. Substantially the same doctrine is adopted by this court in *Drymala v. Thompson*, 26 Minn. 41; and we think that case must control the disposition of the question under consideration. In some states the courts hold that this rule is not applicable to subordinate employees, as in the case of ordinary car inspectors at the transfer yards, but that the latter are to be deemed fellow-servants of other employees injured through their negligence: *Railroad Cos. v. Webb*, 12 Ohio St. 494; *Little Miami Rd. Co. v. Fitzpatrick*, 41 Id.; *Smoot v. Rd. Co.*, 67 Ala. 13. The rule adopted in these and other cases is followed in *Smith v. Rd. Co.*, 46 Mich. 258; *Mackin v. Rd. Co.*, 135 Mass. 206, as applied to foreign cars in transit, which a railway company is obliged by law to draw over its line. In the case last cited the court say by way of explanation: "However it may be as to other cars, the inspectors must be regarded as engaged in a common employment as to such cars while in transit, and until ready to be inspected for a new service." One reason given is that the company was not obliged to repair such cars. That question we need not consider in this case. This car was loaded at the terminus of the line, and by defendants' own regulations was required to be inspected, and, if damaged, to be properly marked to indicate that fact, at its general yard at Albert Lea, by the agents of the defendants appointed for such purpose.

It is difficult to lay down a general rule which will be applicable in practice, and define accurately the limits of the master's liability in this class of cases. But if the special duty and responsibility belong to the car inspector to examine and determine whether a car is unfit for service, and shall be so marked and sent to the repair track or shop, it is difficult to discover any distinction in kind between his duty and that of the mechanics who make the repairs. It will also be borne in mind that the measure of liability on the part of the company is reasonable care, which must be determined by the circumstances in each case. Experience in the competent and practical management of railroads will naturally determine the nature and frequency of inspections which ordinary care would require should be made between the intervals of the more minute examinations at the general repair shops. But the general examinations which experience has shown practicable and necessary to

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be made of cars at the yards designated for such purpose, without causing undue delay, while in the course of transportation, would at least include such patent defects as would be readily discoverable upon inspection by a competent person in the exercise of reasonable care : *Richardson v. Great Eastern Rd. Co.*, *supra*.

In respect to patent defects in the coupling apparatus, brakes, wheels, &c., we may assume that the defendants had undertaken the duty of inspection, and intrusted it to the proper agents. As a rule, also, there is a distinction between the special duties of such persons and the service of other employees who are engaged in handling cars and operating trains. It is not the same in kind as that of a switchman, brakeman or other operative : *Wedgwood v. Railroad Co.*, 44 Wis. 48 ; *Schultz v. Railroad Co.*, 48 Id. 381. The service of the former class relates wholly to the matter of the care and repair of machinery, the use of which is attended with constant danger to other employees, unless maintained in a safe condition ; and they represent the master, not in the capacity of superior officers placed over other employees, but because performing the master's duty in respect to safe instrumentalities. Placing and keeping such machinery upon the road in actual use, would be an assurance to ordinary servants that the same is fit and safe, in so far as the exercise of reasonable diligence could make it : *Murphy v. Railroad Co.*, 88 N. Y. 152. So, in the matter of separating damaged cars from those remaining in use with a view to repairs, the cases proceed upon the principle that enough must have been done by the master to indicate, in conformity with some proper regulations or usage of the company, the condition or character of such cars for the protection of employees who are to handle them : *Flanagan v. Railroad Co.*, 50 Wis. 471 ; *Watson v. Railroad Co.*, 58 Tex. 439 ; *Fraker v. Railroad Co.*, 19 N. W. Rep. 351. And the rule that the corporation is bound to know the defective condition of its cars within a reasonable time, is in harmony with the doctrine that the agents charged with a special duty of looking after and repairing its cars and machinery, *pro hac vice* represent the master.

As before stated, this case does not, we think, differ in principle from *Drymala v. Thompson*, *supra*. There the negligence of the section foreman engaged in repairing the track, who would have otherwise been deemed a fellow-servant with the injured party, was held to be that of the defendants, and it would have constituted no defence that the company had employed competent men, adopted

proper regulations, or provided suitable materials, and an adequate system for supervising and repairing its track. On the other hand in *Brown v. Railroad Co.*, 27 Minn. 162, a road-master engaged with the injured party in operating machinery was held not to represent the company. It is the kind of service, not the grade, which distinguishes these two cases. The one related to maintaining safe instrumentalities; the other, to the use of them.

The application of the rule, as well as the question of the degree of risk assumed by employees, will, of course, be largely influenced by the special circumstances of any particular case. And so, as to different kinds of business, the amount of care required, and the system to be adopted and carried out, are to be determined by the circumstances of each case, depending upon the nature of employment, the extent, hazard and usages of the business, the kind of machinery used, and the risks incident thereto: *Kain v. Smith*, 25 Hun 149.

A witness acquainted with plaintiff's physical condition, though not a physician, was permitted to testify, against the objection of the defendants, to the state of plaintiff's health before and after the accident, and, among other things, that he had since had a skin disease. As he merely stated facts within his observation, and expressed no opinion, the evidence was competent.

The application for a new trial on the ground of misconduct of the jury was made upon affidavits, which are met by counter-affidavits, and was thus determined upon conflicting evidence. It also appears that some of the affidavits on plaintiff's part are not returned to this court. We see no reason, therefore, for questioning the correctness of the decision of the trial court on this point: *Peterson v. Faust*, 30 Minn. 23. So, also, as respects the damages, which are claimed to be excessive; the question was within the province of the jury to determine; and considering the nature of the injury, the age of the plaintiff, extent of his disability and suffering, we are unable to say that the trial court erred in refusing to set aside the verdict for such cause.

Order affirmed.

MITCHELL, J., dissenting.—As I understand the facts of the case, the duty of these "car inspectors" was simply to make a general cursory examination of cars *en route*, upon the arrival at the yard, so as to detect any patent defects. Their duty was substantially

the same as that of local examiners, employed at certain intervals along the line of every railroad, who makes a like cursory examination of the cars of a train in transit. They are ordinary servants of the company, intrusted with no general control or discretion in the management of the company's business or any department, but simply charged with the performance of certain special executive duties in the matter of such local inspection. I think they were mere fellow-servants with those employed in running the trains or moving the cars.

There is much difference of opinion as to whether the doctrine of "common employment" works equitably, as applied to the large business enterprises of the present day, with their numerous departments and different grades of service. But the doctrine has become too thoroughly imbedded in the jurisprudence of England and this country to be disturbed by the courts. If it is to be changed, it must be by the legislature. It seems to me that the doctrine laid down in the opinion of the court in this case, if carried to its logical consequences, goes a long way towards breaking down this well-established rule, which exempts the master from responsibility for injuries to his servants caused by the negligence of their fellow-servants. This doctrine has been so much and so often considered in the books that it would be useless to enter upon any general discussion of it at this time. But it seems to me that confusion has sometimes arisen from a misapprehension or misapplication of certain maxims or rules bearing upon this subject.

It is often remarked that as corporations can only act through natural persons, who are all in a sense servants of the corporation, to hold general agents or superintendents, to whom is intrusted the management and control of its business, to be fellow-servants with all subordinate employees, would be to relieve the corporation of all liability for negligence. It seems sometimes to be inferred from this that a different rule as to such liability is to be applied to corporations from that applied to natural persons. I do not so understand it. In every business there must be some natural person to whom its management and control is intrusted, and who is therefore, if not the master in person, the representative of the master, and for whose acts the master is responsible. If a natural person intrusts the control and management of his business to an agent, such agent, is the *alter ego* of the master precisely as if the same thing be done by a corporation. The only difference is that

in the case of a corporation there must be such a representative, whereas in the case of a natural person there may not be, for he may manage his own business in person. But it seems to me that in either case, when the relation of the employee to the business and the master is the same, the same rule must be applied in determining whether he is the representative of the master or merely a fellow-servant as to other employees.

Again, a familiar rule is that the master is bound to use ordinary care in furnishing suitable and safe instrumentalities for the use of his servants. Included in this is that of maintaining them in a safe condition. *Repairing* is, in a sense, *furnishing*. And, as necessarily incident to the duty of "maintaining," is the duty of providing an adequate system of inspecting, examining and guarding these instrumentalities. It is also the rule that this duty of furnishing and maintaining safe instrumentalities is a primary duty of which the master cannot relieve himself by clothing some general agent with the power, and charging him with the duty of making performance for him, but that the failure of such agent will be the failure of the master. This rule has been sometimes understood as meaning that the master is responsible to his servants for the negligence of every employee, however subordinate his station, who is engaged in performing the most common executive duties in the matters of repairing, examining, or watching the instrumentalities intended for the use of other servants. I think this is a misapprehension of the rule, which has sometimes arisen from losing sight of the distinction between one who is clothed with the powers of the master in the control and supervision of some department of the business, and who is *pro hac vice* the representative or *alter ego* of the master, and one who simply performs what may be termed mere executive details.

Of course, in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. But I have not found any case well considered, either upon principle or upon an examination of the authorities, which seems to me to carry the rule to any such length. I find no support for it in the English cases. The Supreme Court of Massachusetts, which is one of the few whose decisions on this question are anything like consistent, or seem to be governed by some uniform principle, has always held the master strictly to the performance of this primary

duty of exercising ordinary care in furnishing and maintaining safe instrumentalities for the use of his servants, and refused to permit him to shield himself behind the fact that he had clothed some general agent with the power, and charged him with the duty of performing it. This is illustrated by the case of *Ford v. Rd. Co.*, 110 Mass. 240, in which they held the company responsible for the negligence of the *master mechanic* in not repairing an engine, he having entire charge of that department of the business.

But the distinction which I have alluded to is distinctly brought out in the subsequent case of *Holden v. Railroad Co.*, 129 Mass. 268, in which the reasons and limits of the rule and the authorities on the subject are ably discussed by GRAY, C. J., and in which it is, in effect, held that a track repairer and a brakeman are fellow-servants. Almost as a corollary from this last decision followed that of *Mackin v. Railroad Co.*, 135 Mass. 206, which holds that a car inspector and a brakeman employed on the same car are fellow-servants,—a case entirely analogous to the present one.

I have not overlooked the fact that that was a foreign car in transit over the company's road. I also notice the *caveat* in regard to that which the court put into their opinion. But, whatever state of facts they might have had in mind in doing so, it could not have been anything affecting the principle involved in the present case; for it seems to me that this duty of casual inspection of cars while in transit must be the same, whether the car is a foreign one or a domestic one.

In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion. The primary character of the duty of the master to furnish safe instrumentalities is clearly and ably defined by FOLGER, J., in *Laning v. Railroad Co.*, 49 N. Y. 532. But the limits to the rule and the common misapprehension as to its application referred to, are very clearly brought out by ALLEN, J., in *Malone v. Hathaway*, 64 N. Y. 5. The distinction between a general agent intrusted with the control of some branch or department of the business, and who therefore represents the master, and a servant employed to perform some special duties or executive details in the same department, is also pointedly made by FOLGER, J., in *Slater v. Jewett*, 85 N. Y. 61. Neither of these cases has ever been questioned or criticised, although two or three late cases in the same court, which

seem not very carefully considered, appear to lay down a somewhat different rule, but without much discussion or reference to the authorities. This court has itself recognised the same distinction. In *Brown v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 553, we held that a station agent who had general charge of the tracks in and about his station, and whose duty it was to keep them clear and in safe condition for passing trains, was a fellow-servant with an engineer on such a train. In *Roberts v. Railroad Co.*, 22 N.W. Rep. 389, decided at the present term, we held that a switch-tender and a baggage-master were fellow-servants. The *Drymala Case*, 26 Minn. 40, is not in conflict with this distinction. That case was decided upon the ground that the "section foreman," to whom was intrusted the duty of repairing or "furnishing" the track, was the representative of the master; and this was at the time, and is yet, generally considered what might be termed a "border case."

The management of an extensive business, like that of operating a railroad, includes so many departments and so many grades of service that it may not always be an easy matter to draw the line between those who are to be deemed "vice-principals," or representatives of the master, and those who are to be deemed "fellow-servants," as to other employees; but the fact of such a distinction is everywhere recognised. To hold that the master is responsible to his servants for the negligence of every employee of the most subordinate rank who is engaged in the department of repairing, examining, watching or guarding the instrumentalities used by other employees, would virtually abrogate the whole doctrine of "common employment." There is hardly an employee in the service of any railroad whose duties do not, in part at least, relate to the matter of maintaining in safe condition the track or rolling stock. If the rule be that all these *pro hac vice* represent the master, and are performing his duty, the same rule must be applied to all masters alike. Such a rule, if applied to farmers, manufacturers, and others, would, I think, effect a radical change in what has been supposed to be the law. And yet this is, I think, the logical result to which the opinion in this case would seem to lead; for I can see no distinction in principle between these "car inspectors" and switch-tenders; station agents, guards, watchmen, and the like, in so far as their duties relate to maintaining in safe condition the machinery and other instrumentalities of the master, designed to be used by his employees.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.¹COURT OF ERRORS AND APPEALS OF NEW JERSEY.²SUPREME COURT OF RHODE ISLAND.³SUPREME COURT OF VERMONT.⁴ACTION. See *Corporation*.

When Local—Trespass—Practice.—Trespass on the freehold will not lie in this state for a trespass committed on lands in Massachusetts: *Niles v. Howe*, 57 Vt.

Objection to the jurisdiction may be raised at any stage of the proceedings by motion to dismiss: *Id*.

AGENT. See *Partnership*.ATTACHMENT. See *Mortgage*.BILLS AND NOTES. See *Contract*; *Executors and Administrators*.

Seal of Corporation—Effect of.—A promissory note in the ordinary form given by a corporation had on it when produced in court a paper seal. No vote of the corporation authorized the seal; the note did not purport to be under seal; the seal was not the corporate seal; and the treasurer of the corporation who was a witness in the case did not admit putting it on the note: *Held*, that the seal must be disregarded as "mere excess:" *Mackay v. Saint Mary's Church*, 15 R. I.

CONFLICT OF LAWS. See *Mortgage*.

CONTRACT.

Consideration—Guaranty—Endorsement of Note after Maturity—Statute of Frauds.—After a note had matured, but was still held by the payee, two sons of the maker, for the purpose of inducing the payee not to pass the note into the hands of a third person, and to give further time for payment, placed their names under that of their father already upon the note: *Held*, 1. That there was a good consideration to support their contract, which was to pay the amount of the note upon demand. 2. That their contract was not within the operation of the Statute of Frauds: *Frech v. Yawger*, 18 Vroom.

What not an Abandonment of—Estoppel.—By a written memorandum A. agreed to buy, and the B. company to sell, 1000 tons of old rails, delivery to be before August 1st, and also two to six hundred tons for delivery between August 1st and October 1st. The contract was dated January 31st 1880, and was signed by the vice-president for the company,

¹ Prepared expressly for the American Law Register, from the original opinions filed during October Term 1884. The cases will probably appear in 115 U. S. Rep.

² From G. D. W. Vroom, Esq., Reporter; to appear in 18 Vroom.

³ From Arnold Green, Esq., Reporter; to appear in 15 R. I. Rep.

⁴ From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

and he had full authority to make it. On February 17th the vice-president wrote to A., inclosing a minute of a resolution purporting to have been passed at a meeting of the directors of the company on February 16th, confirming the contract, but specifying 2000 lbs. as the ton contemplated. On February 28th, A. replied to this letter saying that the sale was "an absolute and final unconditional sale," and that the number of pounds per ton was to be 2240. This was the number understood between the parties at the time of making the contract. No reply was made to the last letter, which ended with "we hope to hear from you at your early convenience," until June 14th, when the company wrote tendering 1000 tons of 2240 lbs. By that time the price of old rails had fallen: *Held*, that the contract was in full force, and that the company was not estopped from setting it up against A.: *Wheeler v. New Brunswick, &c., Railroad Co.*, S. C. U. S., Oct. Term 1884.

CORPORATION. See *Bills and Notes*.

Tort—Defences—Ultra Vires—Tortious Act of Employee.—A corporation cannot defend itself, in an action for a tort done by it, on the ground that the business in the prosecution of which the tort was done was *ultra vires*: *N. Y., L. E. and Western Ry. Co. v. Haring*, 18 Vroom.

The plaintiff was injured by the mismanagement of a street horse-car. The defendant contended that even if the jury found that it ran such horse-cars that, as it had no franchise so to do, it could not be liable to the action: *Held*, such defence was untenable: *Id*.

An agent of the railroad company ejected, with unnecessary violence, a passenger from the cars: *Held*, the company was liable for the hurts to the passenger done in the course of such ejection: *Id*.

Liability of, for a Claim against the Corporation it succeeded.—A steamship company transferred its ships and other property to another company organized to succeed it, and the officers of the old company became officers in the new company, and the business went on under their direction. After the transfer a man was killed by a collision between canal boats and one of the steamships transferred to the new company. His widow sued the old company and obtained a judgment against it: *Held*, that the property transferred to the new company could not be subjected in equity to the payment of this judgment: *Gray v. National Steamship Co.*, S. C. U. S., Oct. Term 1884.

DIVORCE.

Effect of Articles of Separation—Domicile.—Articles of separation by husband and wife which contain no express stipulation against divorce are not *per se* a bar to a divorce prayed for by the injured party for causes existing prior to the execution of the articles: *Fosdick v. Fosdick*, 15 R. I.

That the liberal divorce law of this state influenced a petitioner for divorce to come here does not make him any the less a domiciled inhabitant of the state, if he came here *bona fide* to reside permanently and not merely to obtain a divorce and then return to his former home: *Id*.

EQUITY.

Bill to remove Cloud on Title—Complainant out of Possession.—Equity will not interfere to remove a cloud upon title in favor of a party

out of possession, claiming under a legal title, against his antagonist who is in possession under the written title which makes the cloud. The remedy at law is sufficient: *Weaver v. Arnold*, 15 R. I.

Practice—Decree against a Co-complainant—Proceedings on New Issues after final Decree.—If one complainant can, under any circumstances, have a decree against another upon a supplemental or amended bill, it must be upon notice to the latter: *Smith v. Woolfolk*, S. C. U. S., Oct. Term 1884.

After a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject-matter of the original litigation, by merely giving the new proceedings the title of the original cause: *Id.*

ERRORS AND APPEALS.

Creditor's Bill—Appeal to the Supreme Court of the United States—Separate Decrees for less than \$5000 each.—Where on final hearing on a creditor's bill defendants were adjudged to pay to the complainants respectively certain sums of money, some of which were less than \$5000, and defendants appealed, *Held*, that the decrees were several, and the appeal must be dismissed as to all of the appellees to each of whom the amount adjudged to be paid did not exceed \$5000: *Stewart v. Dunham*, S. C. U. S., Oct. Term 1884.

EVIDENCE. See Partnership.

Party as Witness—Previous Conviction of Felony.—A defendant in proceedings, civil or criminal, who testifies in his own behalf may be impeached like any other witness by showing his previous conviction of a felony: *State v. McGuire*, 15 R. I.

Contradictory Declarations—Foundation for the Introduction of.—Contradictory declarations of a witness, whether oral or in writing, made at another time, cannot be used for the purpose of impeachment until the witness has been examined upon the subject, and his attention particularly directed to the circumstances in such a way as to give him full opportunity for explanation or exculpation, if he desires to make it: *The Charles Morgan*, S. C. U. S., Oct. Term 1884.

If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible. Circumstances may arise, however, which will excuse its production. All the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so; whether this has been done is for the court to determine before the impeaching evidence is admitted: *Id.*

EXECUTOR AND ADMINISTRATOR..

Authority as to Property in Foreign Jurisdiction—Endorsement of Note—Transfer by one only.—A. died in Connecticut and letters of administration on his estate were taken out in Connecticut. There were no claims in Rhode Island against the estate of A.: *Held*, that the Connecticut administrator could transfer and endorse a promissory note due

the estate of A. so as to enable the endorsee to bring suit on the note in Rhode Island: *Mackay v. Saint Mary's Church*, 15 R. I.

Promissory notes given to two joint administrators for a debt due to the estate of the intestate may be transferred and endorsed by one of the administrators: *Id.*

FORMER RECOVERY.

Negligence—Defeat of Plaintiff in Former Action against Others for same Tort.—A. claiming to be injured by collision with certain teams left in a highway by B. brought an action against B. to recover damages for his injuries. In this action B. obtained judgment. A. then brought an action against the town in which the highway was situated to recover damages for his injuries, charging the town with negligence in permitting the highway to be unsafe. The town pleaded in bar the judgment recovered by B. against A. alleging that B. caused the defect complained of. To this plea A. demurred: *Held*, that the plea was good and that the demurrer should be overruled: *Held*, further, that A. by the judgment which B. recovered against him was estopped from suing the town: *Hill v. Bain*, 15 R. I.

FRAUD. See *Will*.

FRAUDS, STATUTE OF. See *Contract*.

GUARANTY. See *Contract*.

HUSBAND AND WIFE. See *Divorce*.

INFANT.

Avoidance of Contract.—The defendant while an *infant* executed the note in contention for a horse; and before he attained his majority rescinded the contract, tendered the horse to the payee—which was refused—and demanded the note: *Held*, in an action on the note, that the defendant could avoid his contract while under age and that the avoidance and tender annulled it on both sides *ab initio*: *Hoyt v. Wilkinson*, 57 Vt.

LANDLORD AND TENANT

Duty of Tenant to repair adjoining Fence—Nuisance on Premises when Leased.—It is the duty of a farm tenant by force of law to make all needed current repairs on the fences; and if they are not kept in lawful condition it is his fault, and not the landlord's; and an action cannot be maintained against the landlord by an adjoining land owner, whose colt escaped through an insufficient division fence, and strayed on the railroad track, and was there injured. And this is so although the fence was in the same condition at the time of the accident as when the tenant went into possession: *Blood v. Spaulding*, 57 Vt.

LIBEL.

Charges against Public Officer—Malice—Presumption.—Certain citizens presented to the town council of their town a request that K. might be removed from his office of constable because: "firstly, said K. is a man utterly devoid of principle, and uses his office more for the purpose

of wreaking his personal spite than for the peace and harmony of the community; secondly, said K. is wholly ignorant of the duties of his office; thirdly, said K. has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges charged by him against them." Whereupon K. brought an action for libel against the citizens, and at the trial introduced evidence to show that the statements of the request were false: *Held*, that the action could not be maintained without affirmative proof, which was not produced, of express malice: *Held*, further, that proof of the mere falsity of the statements would not support the action: *Held*, further, that the statements were not such as, if proved untrue, to imply actual malice: *Kent v. Bongartz*, 15 R. I.

LIMITATIONS, STATUTE OF. See *Mortgage*.

MASTER AND SERVANT. See *Negligence*.

Negligence—Injury to Passenger by Vehicle—Contributory Negligence of Driver.—A. hired a coach and horses, with a driver, from B., to take his family on a particular journey. In the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train and A. was injured. In an action by A. against the railroad company for damages, *Held*, that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action: *N. Y., L. E. and Western Rd. Co. v. Steinbrenner*, 18 Vroom.

A passenger in a hired coach may, by words or conduct at the time, so sanction or encourage a special act of rash or careless driving as to commit an act of negligence which will debar him from a suit against a third person for an injury resulting from the co-operating negligence of both parties. But for whatever purpose the negligence is invoked—whether as a cause of action for an injury done by the driver, or as contributory negligence to bar an action by the passenger against a third person for an injury sustained—the negligence, to be imputed to the passenger, must be such as arises in some manner from his own conduct. The negligence of the driver, without some co-operating negligence on his part, cannot be imputed to the passenger in virtue of the simple act of hiring: *Id.*

Thorogood v. Bryan, 8 C. B. 114, disapproved: *Id.*

MINES AND MINING.

Location of Claim—Grant of Patent for part of Land to another.—The grant of a patent by the United States for land located or claimed for valuable deposits, is a determination binding on a rival claimant, whether he assert his claim or not; and if the patent includes that part of the rival's claim wherein was situated his discovery-shaft, where all his labor was done, his whole location falls, and the part thereof not included in the patent is open to exploration, and subject to claim for new discoveries: *Gwollim v. Donnellson*, S. C. U. S., Oct. Term 1884.

MORTGAGE.

Chattel Mortgage—Validity of—Effect of removal of to another State—Attachment.—The mode of alienation of personal property is governed by the law of the place where the owner resides, and where the property is situated, and is not affected by the rule requiring a change of possession; thus, a chattel mortgage executed in New York, and valid there, is valid here when the owner comes into this state with the property: *Norris v. Sowles*, 57 Vt.

After breach of condition the mortgagor has no attachable interest in the property: *Id.*

Record—Failure to Index—Limitations, Statute of—Effect of Payment.—An index is not necessary to the validity of the record of a mortgage; thus, the mortgage in question was recorded, but no index was made; a subsequent mortgage was executed and assigned to the defendant, who purchased without notice; *held*, that the first mortgage was superior to the second, and could be foreclosed: *Barrett v. Prentiss*, 57 Vt.

Payment by the mortgagor after he had sold and quit possession, rebuts the presumption of payment arising from lapse of time, not only as to him, but his grantees affected with constructive notice of the mortgage: *Id.*

NEGLIGENCE. See *Former Recovery*; *Master and Servant*.

Concurrence of Negligence and Accidental Cause.—When a traveller on a highway is injured, and the injury results from a combination of two causes, both proximate, one a defect in the highway and the other a natural cause or a pure accident, the town is liable in damages to the injured traveller, provided his injury would not have been sustained but for the defect in the highway: *Hampson v. Tylor*, 15 R. I.

A., injured by falling on a highway which had been washed away in gullies and was slippery with frozen sleet, brought an action for damages against the town. At the trial the presiding judge charged the jury: "If the sidewalk where the accident happened was so defective as to render the town liable in case an accident had happened by reason of the defect in the absence of the obstruction caused by the ice, and this accident happened by reason of such defect, and would not have happened but for it, then the town is liable even though the ice was one of the proximate causes of the accident:" *Held*, no error: *Id.*

Independent Contractor.—The plaintiff's horse was frightened at a steam shovel, and ran, throwing the plaintiff out of his carriage, who thereby received the injury complained of. The shovel was located on the defendant's land and used to obtain gravel to ballast its road-bed near the highway in which the plaintiff was travelling. The defendant's evidence tended to show that the shovel was operated and wholly controlled by one M., an independent contractor and his servants, although its use was contemplated when the contract was made; and the question being whether the defendant or M. was liable, the court charged in effect that the defendant's liability was co-extensive with that of M., if it was part of the agreement that the shovel should be used in doing the work: *Held*, error: that the work being lawful, and the shovel not a nuisance, until it became so by negligent use, the defendant was not liable

unless the relation of master and servant existed between it and those operating the shovel ; unless it not only prescribed the end, but directed the means and methods ; and that the inquiry was, whether the defendant or M. was the principal or master in operating the shovel ; if M., and it became a nuisance through his negligence, he alone was liable, although it was understood by the defendant, in making the contract, that the shovel was to be used : *Bailey v. Troy & Boston Railroad Co.*, 57 Vt.

Railroad—Precautions required in Places of Extra Danger—Mistake of Traveller in Moment of Peril.—Where a railroad company has created extra danger it is bound to use extra precaution ; and if the track is put in a position where the trains, when close to their transit over a public street or road, cannot be seen, that is an extra danger calling for more than ordinary cautionary signals : *N. Y., L. E. and Western Railroad Co. v. Randel*, 18 Vroom.

It was not error in the court, in such a case, to refuse to charge that under the circumstances the company had discharged its whole duty to those of the public who had occasion to use the track at that place, by merely ringing the bell at the crossing : *Id.*

Where a traveller was crossing, in a wagon, the tracks of a railroad in a place of extra danger, and the flagman did not notify him of the coming of the train until after he had begun to cross the tracks, and the traveller then misunderstood the warning and went forward when he ought to have retreated : *Held*, that such misunderstanding should not, under the circumstances, be imputed to him as negligence : *Id.*

PARTNERSHIP.

When not dissolved by Death—Agent—Obligation of Contract by—Declarations of.—While the death of a partner generally works the dissolution of a partnership, it does not have that effect when the partnership contract shows the intention of the parties was to give it a continuing existence ; as when it takes the form of a joint stock association, with transferable shares, officers, records, and a general agent to transact the business : *McNeish v. U. S. Hulless Oat Co.*, 57 Vt.

It is for the jury to determine, on a reasonable construction of the articles of agreement, interpreted by the kind of business contemplated and the manner of transacting it, whether the intention was that the partnership should be continuing, or dissolved by the death of a partner : *Id.*

Dealing in hulless oats was the main business of the partnership, under the control of a general agent, with a provision that its "affairs" were to be kept secret : *Held*, that partners might be liable for common oats purchased by an agent, although it was not proved that they knew of the transaction ; and that it was their duty to see to it, that their agents transacted no business outside the scope of the partnership : *Id.*

What the agent said to the vendor at the time of the sale as to who the partners were and what was their responsibility, was admissible evidence : *Id.*

POWER.

Renunciation by one of two Donees of Power—Authority of other to Execute.—When a power, coupled with a trust is given to two or more

persons to be executed by them jointly, and one renounces, the other or others may execute the power as if originally given only to them, that the trust may not fail nor suffer delay: *Petition of William M. Bailey*, 15 R. I.

A. by will devised and bequeathed his estate to B. and C. in trust, to sell, to invest the proceeds, and to use the income for his daughters during their lives, with remainder over. In case of the death, refusal or inability of one of the trustees, the testator desired the other to fill the vacancy. One of the trustees refused the trust; the other did not make an appointment in his stead, but alone made sales and gave deeds of the devised realty: *Held*, that the sales and deeds so made and given by the one trustee were valid: *Id.*

PRACTICE. See *Equity*.

RAILROAD. See *Negligence*.

RECORD. See *Mortgage*.

SEAL. See *Bills and Notes*.

SURETY.

Effect of Decree against Principal.—A surety of a receiver in chancery held to be concluded in a suit at law on the bond, by the amount found due on an account taken in chancery, he having by due notice, had an opportunity to intervene in the taking of such account: *Ball v. The Chancellor*, 18 Vroom.

Official Bond—Duties imposed by Law.—Sureties on the official bond of a city clerk, who by the city charter is also *ex officio* register of licenses of the city, are liable for the embezzlement by him of license fees received by him as such register of licenses: *Van Valkenburgh v. The Mayor of Paterson*, 18 Vroom.

A surety upon an official bond must be held to have contracted with reference to the obligations devolved upon his principal by law: *Id.*

TRESPASS. See *Action*.

TRIAL.

Limiting Time for Speeches.—It is in the discretion of the court to limit the time to be occupied by counsel in addressing the jury, and unless that discretion is so exercised as practically to deny to the accused his constitutional right to have the assistance of counsel, it is not error: *Sullivan v. The State*, 18 Vroom.

TROVER.

Animals feræ naturæ—Title to.—Bees are animals *feræ naturæ* and until reclaimed are only owned *ratione soli*: *Rexroth v. Coon*, 15 R. I.

In obtaining possession of an animal *feræ naturæ* no title is gained by one who when so obtaining possession is a trespasser: *Id.*

A., without B.'s permission, put upon a tree on B.'s land an empty box for bees to hive in. The box remained there more than two years, when C. took the box down, took out a swarm of bees and replaced the box. A., after demand upon C., brought trover against C. for the value of the bees, honey and honey comb: *Held*, that A. could not maintain his action against C.: *Id.*

TRUST. See *Power*.

UNITED STATES.

Customs Duties—Value of Foreign Coins.—The value of foreign coins, as ascertained by the estimate of the director of the mint, and proclaimed by the secretary of the treasury, on the 1st day of January in each year, in accordance with sect. 3564 of the Revised Statutes of the United States, is conclusive upon custom house officers and importers: *Hadden v. Merritt*, S. C. U. S., Oct. Term 1884.

UNITED STATES COURTS. See *Errors and Appeals*.

WILL.

Fraudulent consent of Heirs to set aside Will to avoid Legacy.—When a testator devises his real estate to his heirs, and in the same will gives certain sums of money to persons who are not his heirs, making the payment of the legacy a charge on the land, it is a fraud for the heirs, by agreement exclusively between themselves, to procure the county court to render a judgment disallowing the will—the case being there on appeal from a decree of the probate court establishing the will—and then to divide the estate solely among themselves, ignoring the rights of legatees to whom money had been willed, who were minors and unrepresented. And in such a case the court of chancery has jurisdiction and, the land still being in the possession of the heir, has power to charge the legacy upon it, and this on the ground of fraud: *Wetherbee v. Chase*, 57 Vt.

LIST OF THE PRINCIPAL NEW LAW BOOKS.

FERGUSON.—*Manual of International Law, for the use of Navies, Colonies and Consulates.* By J. H. FERGUSON. 2 vols. 8vo., pp. 1201. London: W. B. Whittingham & Co.

FREND.—*Peregrina; or Land Transfer, and other Conveyancing on Short Lines.* By H. T. FREND. 8vo., pp. 55. London: H. Sweet & Sons.

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WALKER.—*A Treatise on the Practice of the Pension Bureau, governing the Adjudication of Army and Navy Pensions, being the Unwritten Practice Formulated.* By C. B. WALKER. Revised Edition. 8vo., pp. 134. Washington: J. H. Soulé.

WILLIAMS.—*The Law of Theatres and Music-Halls, including Contracts and Precedents of Contracts.* By W. N. M. GEARY. With Historical Introduction, by J. WILLIAMS. 8vo., pp. 230. London: Stevens & Sons.

WILTSIE.—*Parties to Mortgage Foreclosures and their Rights and Liabilities in Connection with Actions and Proceedings for the Foreclosure of Mortgages.* By C. H. WILTSIE. 8vo., pp. 298. Rochester, N. Y.: Williamson & Higbie.

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THE POWER OF AN ADMINISTRATOR WITH THE WILL ANNEXED OVER HIS TESTATOR'S REAL ESTATE.

IN many of the states of the Union, there are statutes granting powers to and imposing duties upon administrators *cum testamento annexo*, with regard to the care and disposition of the real estate of the testator. While this power and authority is purely statutory in its character, still there are certain general features that prevail in most all of these statutes, so that it is a subject that is of more than local importance. There is no collection or statement of the decisions of the different courts construing and applying these statutes, so far as this writer knows. It is the purpose of this article to present a few points on this matter.

§ 1. *Authority of Executors and Administrators at Common Law over Decedent's Realty.*—At common law an administrator took no interest in the real estate of the decedent, nor did an executor, unless by force of the provisions of his testator's will. An administrator is merely the agent or trustee of the estate of the decedent, acting immediately under the direction of the law prescribing his duties, regulating his conduct, and limiting his power: *Collamore v. Wilder*, 19 Kans. 67, 78; s. c. 17 Am. L. R. (N. S.) 135. He has no authority over the realty of the intestate except to sell in pursuance of an order of sale properly issued by a court of competent

jurisdiction. Having no general authority, he must strictly comply with the law: *Broadwater v. Richards*, 4 Mont. 80, 84.

An executor and administrator at common law, after the granting of letters of administration, had essentially the same powers: Wms. on Exr's 610. But these powers pertaining to the respective offices, only extended to the personal estate. So, it has been held, that an administrator as such cannot maintain a bill in equity to remove a cloud from the title to realty: *Smith v. McConnell*, 17 Ill. 135. Nor is he authorized, in the ordinary course of administration, to lease the real estate of his intestate: *Terry v. Ferguson*, 8 Port. 500. Neither can an executor, as such, sell the lands of his testator, unless directed to do so by his will: *Lippincott's Ex'r v. Lippincott's Ex'r*, 4 C. E. Green 121; s. c. 8 Am. L. Reg. (N. S.) 127. Nor can executors make a dedication of their testator's realty, for the purposes of a street, in the absence of authority conferred by the will, or an order and decree authorizing such disposition of the testator's realty given by a court of competent jurisdiction: *Kaim v. Harty*, 73 Mo. 316. So where an executrix brought an action for an alleged trespass upon her testator's land, the same was dismissed, the court saying "the real estate of a deceased person descends, upon his death, to his heirs or passes to the devisees under his will." By the common law, the personal representative, whether executor or administrator, takes no interest in it: *Aubuchon v. Lory*, 23 Mo. 99. And to the same point, generally, see *Leavens v. Butler*, 8 Port. 389; *Chighizola v. Le Baron's Ex'r*, 21 Ala. 410; 1 Williams on Ex'r's 650, n. (D 1), and 1 Perry on Trusts, 3d ed. § 262.

§ 2. *Authority of Administrators, c. t. a., at Common Law, over Decedent's Realty.*—An administrator *c. t. a.* is a person appointed by the court to administer the testator's estate, in cases where he has appointed no executor, or where the appointment fails: Williams on Ex'r's 461. While it is true, generally, that an administrator *c. t. a.* succeeded to all the powers and rights, and was charged with all the duties which by the testator's will were imposed upon an executor, still, as already shown, an executor, *virtute officii*, took no interest in, or power or authority over his testator's realty, unless he was vested with it by the language of the will. Therefore, at common law, the administrator *c. t. a.* only succeeded to that power and authority, and was only charged with those duties which pertained to the office of an executor, *as such*, and affected only

the control and disposition of the personal estate of the testator. So, "where testator directed his lands to be sold by his executors, this was a personal trust; and as the executors renounced, there was no one by whom the duty could be fulfilled. A sale by administrators *c. t. a.* was altogether unauthorized and void: *McDonald v. King*, Coxe 432. So, in Pennsylvania prior to the act of March 12th 1800, it was held that, "where there is a naked power to sell and they renounce, administrators *c. t. a.* have not, either at common law or by statute, authority to sell, although the object of the sale be the payment of debts:" *Moody v. Vandyke*, 4 Binn. 31; *Moody's Lessee v. Fulmer*, 3 Grant 17. So, in an action of ejectment, wherein the plaintiff claimed title through a deed from an administrator *c. t. a.*, it not appearing to the court whether the devise of the testator to his executor was a mere naked power or one coupled with an interest, it was held that the plaintiff could not recover, the court saying, "the powers of an administrator with the will annexed are the same as those which pertain to an executor *as such*;" and that, "an executor *virtute officii* at common law had no right to take possession of the lands of his testator. If they are devised they pass to the devisee, who may enter upon and take possession; if undevised they descend to the heirs, who are entitled to the possession:" *Lucas v. Doe ex d. Price*, 4 Ala. 679, 682. Nor can an administrator *c. t. a.* recover the possession of premises from a tenant thereof, who is holding over after the expiration of his term: *Floyd, Admr., v. Herring*, 64 N. C. 409. And where a bill in equity was filed to remove a cloud from title to realty caused by the deed of an administrator *c. t. a.*, the court dismissed the bill, holding, that the complainants had an adequate remedy at law, since the deed was void on its face: *Posey v. Conway*, 10 Ala. 811. The Supreme Court of the United States, in commenting on the powers of an administrator *de bonis non* with the will annexed, who had been appointed under the Statutes of Maryland, the statutes being silent as to his powers, said: "By the common law his duties are confined to the personal estate unadministered by his predecessor. Whatever authority he may possess as to the real estate must be derived from the will. If not found there in express terms, or by necessary implication, it has no existence; hence the test in all such cases is the intention of the testator. Many of the duties enjoined upon the executors (by the will in question) were foreign to those which come within the scope of

their ordinary functions. Such powers never pass by devolution to an administrator, unless it be clear that it was the intention of the testator that he should become the donee of the power, in place of the executor appointed by the will. If no provision is made by the will for such substitution, the power does not become extinguished, but the case falls within the category of those where a court of equity will not permit a trust to fail for want of a trustee, but will appoint one and clothe him with the authority adequate to the duties to be discharged :'' *Ingle v. Jones*, 9 Wall. 486, 498; See also, 2 Perry on Trusts, § 500, n. 1, and 1 Williams on Ex'rs 654, n. (W¹); *Brush v. Young*, 4 Dutch. 237; *Atty.-Gen. v. Garrison*, 101 Mass. 223; *Lockwood v. Stradley*, 1 Del. Ch. 298; *Besley's Estate*, 18 Wis. 451; *Abell v. Howe*, 43 Vt. 403.

§ 3. *Survivorship of Executorial Authority at Common Law—Statute of 21 Henry 8, c. 4.*—At common law when executors were vested with the authority to dispose of their testator's real estate, the death, failure, inability or refusal of one or more, less than the whole of their number, to act, wholly defeated the valid execution of the authority. To avoid the great embarrassment caused by this rule, the statute of 21 Henry 8, c. 4, was passed. This act in substance provided, that where lands were devised to be sold by executors, that those, although less than the whole number named in the will, who took upon themselves the administration of the will, should be competent to make as valid bargains and sales of the real estate devised to be sold as if all the executors named had joined. For the full text of this statute, see Important English Statutes 19. This statute, or some modified form of it, has been adopted in most of the states of this country.

The rules of law laid down as to the execution of this authority of the executors are somewhat complex, and are hardly capable of formulation into inflexible rules. This arises from the application of the rule which, in each particular case, gives effect to the lawful intent of the testator as shown by the construction and interpretation of his will. The executor's authority over the testator's real estate is divided into two classes, viz. : 1. A naked power; and, 2. A power coupled with an interest or a trust: Powell on Devises 292. Mr. Powell seems to make two exceptions under the head of naked powers on the question of the survival of the power: they are: 1st, where the authority is given by the testator, to his executors,

as executors; and 2d, where authority is given by the testator, but there is no appointment by express words what person shall sell the land; for which reason the law implies that they shall do it, who have power to pay the debts or distribute the money, viz.: the executors. In such case the executors take in their official capacity, and as the office never dies the authority survives: Powell on Devises 294, 298-9. At common law a purely naked power did not survive. So it is said of the act of 21 Henry 8, c. 4, the question has been, whether this statute extended to executors where a power to sell was given to them *nominatim*; and all the authorities agree, that if a power is given, indicating personal confidence, it must be confined to the individuals to whom it is given, and will not, except by express words, pass to others than the trustees originally named, though they may by legal transmission, sustain the same character. So it was decided in *Cole v. Wade*, 16 Ves 27, and in many other cases; *Tainter v. Clark*, 13 Met. 220, 226. Powell on Devises 294; 1 Sugd. on Powers *146-7.

A naked power is discretionary with the donee, and no court can compel or control the execution thereof, although he leave it unexecuted; but the rule is different in the case of a power coupled with an interest or a trust. In such case a court of equity will not allow it to fail for want of a trustee: Perry on Trusts, § 248. It is apprehended that this doctrine of the court of equity just stated was the foundation of the passage of the statute of 21 Henry 8, c. 4; *Brown v. Armistead*, 6 Rand. 594, 598; *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584.

§ 4. *Reason for, and construction of Statutes which vest Executorial Authority over Decedent's Realty, in Administrators c. t. a.*—The rule that a trust shall not fail for want of a trustee, which is thought to be the foundation of the statute of 21 Henry 8, c. 4, is also the foundation of the statutes of the several states of the Union, which provide for the exercise of the same power as the executors, over their testator's real estate, by the administrators with the will annexed: *Brown v. Armistead*, 6 Rand. 594, 598; *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584, 598; *Evans v. Blackiston*, 66 Mo. 437, 439. It was said by Lord COKE, of the statute of 21 Henry 8, c. 4, "Albeit, the letter of the law extendeth only to where executors have a power to sell, yet being a beneficial law it is, by construction, extended to where lands are devised to executors to be sold:" cited in *Corlies v. Little*, 14 N. J. L. 373, 388-4.

And in this country that statute, or the substitutes therefor, are liberally construed: *Taylor v. Morris*, 1 N. Y. 341, 359; *McDowell v. Gray*, 29 Penn. St. 211. It is therefore held that the laws giving to the administrator with the will annexed the same powers as the executors is a remedial statute, and accordingly is to be liberally construed: *Drayton v. Grimke*, 1 Bailey Ch. *392; so, where the express provisions of the law did not authorize the administrator *c. t. a.* to act in cases where the testator named no executor of his will, it was held that the case was within the reason of the law, and that the administrator *c. t. a.* might lawfully exercise a power of sale conferred by the will, though no executor was named therein: *Hester v. Hester*, 2 Ired. Eq. 330, 339; and where the statute authorized the administrator *c. t. a.* to act, if none of the executors qualified, or if having qualified they should die before sale and conveyance, it was held that he was authorized to act under the statute where only one of the executors died, and the remaining one had been removed from his office before the sale: *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584, 598.

§ 5. *The Character and Classification of such Statutes.*—The character of the statutory provisions of those states of the Union, so far as the writer has been able to examine them, which vest the executorial power over real estate in the administrator *c. t. a.*, may be divided into three classes: 1st. Those states where words expressly descriptive of realty are used by the lawgivers in giving the authority to the administrators *c. t. a.*; 2d. Those states where no words descriptive of realty are used, but a necessary implication arises from effectuating other sections of the statute which clearly refer to the exercise of executorial authority by the administrator *c. t. a.* over the testator's realty; 3d. Those states where the law provides, that the same authority shall vest in the administrator *c. t. a.* as was reposed in the executor, but there is no reference to the exercise of any authority over realty, either expressly, as in the first class, or by implication, as in the second class. The first class includes the following states: Alabama: Rev. Code, § 1609; California: Probate Act, §§ 48 & 178; Colorado: Genl. L. 1877, § 2882; Missouri: Wag. St. 93, sec. 1; New Jersey: Nix. Dig. 258, § 20; North Carolina: R. S. Ch. 46, sec. 34; Ohio: 2 Rev. St. (S. & W.) 1629, sec. 1; Pennsylvania: Purdon's Dig. 283, § 69; Rhode Island: Rev. St. Ch. 156, sec. 27; South Carolina; Tennessee: Code, sec. 2240; and Virginia. The state of Kentucky

is now included in the first class, but prior to a recent enactment it was the only state in the second class. The third class includes the states of Connecticut: Gen. Sts., p. 371, sec. 12; New York and Wisconsin: Rev. Sts. 1858, ch. 98, sec. 11. The power or authority which the administrators with the will annexed may exercise over their testator's real estate depends almost entirely on the intention expressed in the will of the testator. If no authority is given by the will to the executor, none can pass to the administrator *c. t. a.*: *Montague v. Curneal*, 1 A. K. Marsh. 351; *Ashburn v. Ashburn*, 16 Ga. 213.

§ 6. *Character and Classification of Executorial Authority over Testator's Realty.*—To determine to what extent the administrator *c. t. a.* may exercise the powers vested in the executor is a matter of no little difficulty; but it is thought that most of the cases can be reconciled. The executor "may in some instances be seised of real estate of the deceased as trustee, or be *ex officio* invested with the power of disposing of it:" 1 Williams on Ex'rs 654. SHAW, C. J., says, "the distinction seems to be between cases where the testator gives special directions to his executor as executor, or confers on him as such particular powers and trusts, and cases where the testator, having appointed one or more persons as executors, creates the same persons trustees, or gives the residue to them upon trusts specified. In the latter case the law presumes that he reposes special trust and confidence in the persons of the executors, by name or otherwise, and does not rely upon their official duty as executors. In the former it is an enlargement of the office of executor:" *Treadwell v. Cordis*, 5 Gray 341, 359. The meaning of the phrase, "in the former it is an enlargement of the office of executor," in the foregoing quotation, is, at first blush, a little perplexing. But when we remember that the learned judge was discussing the power of an executor over real estate under common and statute law, it becomes clear that he meant, by "enlargement of the office of executor," an extension of executorial power to the testator's real estate as an additional matter of administration, an authority not existing at common law in the administration and settlement of estates. From this it is apparent that the power of the executor over his testator's real estate may be divided into two classes, viz.: 1. Cases where the will vests him with the power *personally*, as a trustee; 2. Cases where the will annexes to the office of executor particular powers and trusts; these powers and trusts are only such

as belong to such an office, in the ordinary course of administration and settlement of estates ; if they are an enlargement of the office and extend beyond the ordinary course of administration the authority must be placed under the first class.

§ 7. *Character and Construction of Statutory Authority of Administrators c. t. a. over Decedent's Realty.*—This same classification of the executorial power is found in the construction of the statutes of states which vest that power in the administrators with the will annexed. In all those cases falling within the first class of executorial power above named, where the executor is vested with authority, as a *trustee*, it is held that the administrator *c. t. a.* cannot exercise the power.

So, where the will created a trust fund, appointing E. G. to act as trustee, and in the subsequent part of the will named the same E. G. executor of the will ; on the death of E. G. and the issuance of letters of administration *de bonis non c. t. a.*, the court said : " the trust, though created by the will, is not thereby vested in the executrix, *qua* executrix or *ratione officii*, but given to her *nominitim*. And as the trust, therefore, is not connected by the words of the will, nor yet by any of the provisions or operation of law, with the executorship, the trust and executorship are to be viewed as if they were vested in two distinct and different persons by the words of the will," and the administrators *d. b. n. c. t. a.* were held not to be entitled to the possession of the trust fund: *Ebert's Appeal*, 9 Watts 300, 302. So, where the testator devised unto his executors, " all and singular the rest and residue of " his " estate, real and personal, *upon the trusts*, and for the purposes hereinafter named," then declared the trusts, giving to the survivor or survivors of the trustees power to sell and convey his realty. The executors having renounced, letters of administration *c. t. a.* were issued, and a sale of land so devised was made by the administrators *c. t. a.* In an action of ejectment, the court, in deciding that the deed of the administrators *c. t. a.* was void, said, " by force of the act of the 24th of February 1834, relating to executors and administrators, he (the administrator *c. t. a.*) may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose. * * * For purposes purely administrative, the thirteenth and fourteenth sections give the devise of a power the effect of a devise of the title, and the sixty-seventh section puts an administrator with the will annexed on a footing with a surviving

executor, but not on a footing with a testamentary trustee." Again, "now the object of the statute was to make lands legal assets in all cases, and when a trust is created to bring it into a course of administration, it is proper that an administrator should succeed to the execution of it; but the statute was not intended for a trust unconnected with an executor's ordinary duties:" *Ross v. Barclay*, 18 Penn. St. 179; *Belcher v. Branch*, 11 R. I. 226, 229; *Brush v. Young*, 28 N. J. L. 237; *Pratt v. Stewart*, 49 Conn. 339; *Anderson v. McGowan*, 42 Ala. 285; *Tarver v. Haines*, 55 Id. 503, 509; *Harrison v. Henderson*, 7 Heisk. 315, 348-9.

The authority over the testator's real estate vested by the will in the executor, to which the administrator *c. t. a.* succeeds, is included in the second class, into which the executorial power was above divided, to wit: That authority which is annexed to, or constitutes the duties pertaining to the executorial office in the ordinary course of the administration and the settlement of estates. "It was considered by the legislature that he who had the execution of the will in regard to the personal estate, should have it also in regard to the real, in the absence of any direction in the will to the contrary, and would be a fit person for the purpose, whether nominated executor by the will or appointed administrator with the will annexed by the court of probate:" *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 598. The effect of the adoption of those laws which are similar to the provisions of 21 Henry 8, c. 4, and the statutes vesting executorial power in the administrators *c. t. a.* is thus stated by the Supreme Court of Alabama: "This statute obliterates the common-law distinction, as to survivorship and capability of execution, between a devise of lands to executors with directions to sell and a naked power of sale. Under its operation each is capable of execution by the surviving or acting executor;" and this power is extended, "to an administrator with the will annexed who would not otherwise have succeeded to it:" *Tarver v. Haines*, 55 Ala. 503, 507. "As a general rule the powers of the executor are co-extensive with the trusts created by the will. And while he is engaged in administering any and all the trusts created by the will, it must be presumed that he is acting in the capacity of executor alone, unless it plainly appears that such was not the intention; although *the duties be such as are unusual* in the course of ordinary administration:" *Mathews v. Meek*, 23 Ohio St. 272. And, "all the provisions of a will should be executed by

the administrator with the will annexed unless a contrary intention clearly appears :'' *Pratt v. Stewart*, 49 Conn. 339, 341.

§ 8. *Illustrations showing when Authority vested in Executor may be exercised by Administrator c. t. a.*—In the following cases the authority given by the will was held to pertain to the office of the executor, and therefore capable of execution by the administrator with the will annexed. A contest on final settlement of account of administrators *c. t. a.*, under a will which provided that "it is my will that the shares of property which may be allotted to my children, shall be sold by my executor," and "that my executor shall lend out the money which may arise from said sale belonging to my children." The administrators *c. t. a.* sold the real estate, receiving confederate money; the heirs objected to the allowance of the money received on such sales in the account, but the objection was overruled: *Anderson's Adm'r v. McGowan*, 45 Ala. 462; overruling same case, 42 Ala. 280. Action to recover proceeds of sale made under will, which "directed executor to sell real estate in one year after testator's death, and devised avails so that his daughter should receive one-fourth thereof:" *Pratt v. Stewart*, 49 Conn. 399. Action to enjoin sale of real estate under will which provided, "executor will within one year after my decease, sell at public auction (stating terms) all the real estate I shall own at the time of my decease; from the proceeds of sale pay expenses of sickness, funeral and all my just debts;" then apply proceeds to a number of specific trusts and payment of legacies: *Kidwell v. Brummagin*, 32 Cal. 436; *Jackson v. Jeffries*, 1 A. K. Marsh. 88; *Peebles v. Watts*, 9 Dana 102. By recent statute in Kentucky, it seems that an administrator can exercise a power of sale, although it was only *discretionary with the executor*. Action to recover remainder of purchase-money on a sale made by administrator under a will "directing it to be sold by executor at 'the death of testator's widow,' to the highest bidder at public auction: *Gulley v. Prather's Adm'r*, 7 Bush 167; *s. p. Shields v. Smith*, 8 Id. 601. Action of ejectment against purchaser from administrator, who sold under a will which provided "all of the real estate, except that bequeathed to my wife, I direct and empower my said executor to have divided into seven equal parts, as nearly as may be, leaving such roads as he may deem necessary, &c., and sell the same at such time and on such terms as he may think fit, hereby empowering him to convey all my right, &c., to purchasers, and the proceeds of said

sale to be distributed in equal parts among my seven children:" *Dilworth v. Rice*, 48 Mo. 124. Ejectment by trustee of heirs, against purchaser from administrator *c. t. a.* under will, providing, "I will unto my friend C., as trustee, all my real estate for the following purposes, to be divided into lots by him, and sold by him at his discretion; proceeds I direct shall be invested in purchasing convenient lot, and erecting dwelling thereon, to be by him taken in name of my sister B. for her life, remainder to her three children, and to be equally divided between them at her death:" *Evans v. Blackiston*, 66 Mo. 437. A bill to set aside a sale made to himself by administrator, under a will providing that "a moiety of real estate" be devised "to my daughter F. for life, on her death to her husband V. for life, and on his death to his children by said daughter in fee; and when said lands should belong to said children, surviving executor or executors might make sale of real estate to make an equal division among said children, unless they (children) could all agree upon a division;" part of children were under age at time of sale by administrator *c. t. a.*: *Howell v. Sebring*, 1 McCart. Ch. 84. Where testator bequeathed and devised the whole of his lands and personal estate to his wife for her life, and after her death, the whole to be sold, "and the money arising from the sale to be equally divided between my sons and daughters:" *Smith v. McCrary*, 3 Ired. Eq. 204. Where will bequeathed to executors, in trust, \$10,000 to be put at interest by them for six years, then to be appropriated by "the executors," to the objects of the trust, the surviving executor having partly executed trust, and paid money to contractor to apply as directed by will, taking a bond for faithful performance of contract, and then resigned; the administrator *c. t. a.* was held to succeed to the management of trust, and as entitled to sue on contractor's bond for breach thereof: *Mathews v. Meek*, 23 Ohio St. 272. Will provided, "I desire and hereby direct my executors, or the survivor of them, to sell and convert into money, as soon as the same can be done on good terms and without sacrifice, all of my property, both real and personal," (specifying terms in the discretion of executors), "and to pay the money thus acquired into the hands of the trustee hereinafter named: *Elstner v. Fife*, 32 Ohio St. 358. In disposing of the responsibility of bondsmen, it was said by the court, "by the act of 12th March 1800, he (administrator *c. t. a.*) has the same powers and authorities as were conferred on the executor. If he has the

power to sell, the administrator *d. b. n. (c. t. a.)* has the same power and authority: *Commonwealth v. Forney*, 3 W. & S. 353, 356; *Meredith's Estate*, 1 Pars. Sel. Eq. C. 433. Testator's will devised his realty to wife for her life, with power to dispose of the residue after payment of specific legacies; by her will she directed her executors to sell her house and lot, same having been acquired under her husband's will; *held*, "the executors were not made testamentary trustees of the property; they were directed to sell for distribution; their duties were official by virtue of their office. When they renounced, their duties and powers devolved upon the administrator with the will annexed: *Keefer v. Schwartz*, 47 Penn. St. 503. Where will vested in executors discretionary power as to time, manner and terms of sale of his realty, the proceeds to be distributed among testator's heirs: *Evans v. Chew*, 71 Penn. St. 47; affirming s. c. 8 Phila. 103. Will devised house and lot to wife for life, directing if she "should desire, and my executors deem it for the best interests of my wife and children that it should be sold, they may sell the same;" it afterwards provided for the distribution of the residue among the heirs, according to laws of the Commonwealth: *Lantz v. Boyer*, 81 Penn. St. 325. Will gave power to executors "to sell and convey real estate in such manner as they shall think proper, either at public or private sale," and "to receive the purchase-money and give acquittances for the same," also directed them "to pay or transfer the one equal half part to his son," and to other legatees: *Jackman v. Delafield*, 85 Penn. St. 381. Will directed that all just debts be paid, charged real estate with payment of legacies and annuities, expressly authorized executrix to sell real estate for payment of debts, also gave general authority to sell, and requested that no bond, or only nominal bond, be required of executrix; wife made executrix; sale by the administrator *c. t. a.* to pay debts and legacies: *Bailey v. Brown*, 9 R. I. 79; *vide also Probate Ct. v. Hazard*, 13 R. I. 3. Will directing executor to sell and convey for payment of testator's debts: *Drayton v. Grimke*, Bailey Ch. 392. Will "directed that the crops made on his lands should be used to pay his debts, with power to his executors, if necessary, or "if they think best to sell a part or any portion of his lands given to R.:" *Dougherty v. Crawford*, 14 S. C. 628 (notes of unreported cases). Will provided that "all lands be sold by executor, and the proceeds, after payment of debts, funeral expenses, costs and expenses of executing will, and pro-

viding for pecuniary bequests, be divided among children and subject to certain specific trusts:" *Harrison v. Henderson*, 7 Heisk. 315. Will devised land to testator's widow, during life or widowhood, upon her death or marriage land to be sold on certain terms "and the money to be equally divided among children;" also directed payment of his debts: *Green v. Davidson*, 4 Bax. 488. Will provided "that the executor should sell the land assigned to testator's widow as dower, and divided the proceeds among certain of his children:" *Blakemore v. Kimmons*, 8 Bax. 470. Will provided that "the land should be sold for the best price that could be got, which was directed by a power of attorney to H., of the same date," and the proceeds divided among his four sisters: *Broadus v. Rosson*, 3 Leigh 12. Will provided "that executors sell at public sale all my land, provided the said land will sell for as much, in their judgment, as will be equal to its value, and the money be placed in the hands of A.:" *Brown v. Armistead*, 6 Rand. 594. Will provided "that executors, whenever they should think best, should sell his land in B.; that the money arising therefrom, after payment of all just demands against estate," and making provision for certain legacies, "shall be equally divided between B., M. and J.:" *Mosby's Adm'r v. Mosby's Adm'r*, 9 Gratt. 584.

§ 9. *Illustrations showing when Authority vested in Executor, can not be Exercised by Administrator c. t. a.*—In the following cases the authority conferred by the will was held to be vested in the executor as a trustee, and therefore not capable of being exercised by the administrator *c. t. a.*

The will vested the executors with discretionary power as to selling the real estate of the testator, for the purpose of dividing his estate among his heirs; but, by a codicil, gave to his wife all of his personal estate; the court held that the effect of the codicil was to make the power of the executors, in effect a power to *partition realty*; the court also went on to decide, that, *admitting the power of sale was annexed to the office of executor, it did not pass to the administrator c. t. a.* under their statute: *Dominick v. Michael*, 4 Sandf. 374. (It seems to the writer that the decision of this point was not necessary to the determination of the case, and the subsequent decisions of the courts of that state regard as it as *obiter*.) The same point was considered in the case of *Conklin v. Egerton*, 21 Wend. 430, where the same view of the statute was

taken ; but, on the final decision of this case by the court of last resort, this point was expressly left undetermined : 25 Wend. 224. In the meantime, a case was decided in which the contrary view was taken, incidentally, however, to wit : That where the authority pertained to the office of executor, under the statute, "in such cases the administrator with the will annexed is probably entitled to execute all the trusts of the will, in the same manner as if he had been named therein, by the testator as the executor and trustee:" *De Peyster v. Clendining*, 8 Paige Ch. 295, 310.

The cases of *Dominick v. Michael*, and *Conklin v. Egerton*, are cited by the Court of Appeals of New York in the following cases: *Beekman v. Bonsor*, 23 N. Y. 298, 303; *Roome v. Philips*, 27 Id. 357, 363; *Bain v. Matteson*, 54 Id. 663; *Dunning v. Ocean National Bank*, 61 Id. 497.

The view expressed in *De Peyster v. Clendining*, *supra*, was adopted in *Bain v. Mattison*, *supra*, but the question does not seem to have come squarely before the court of last resort, until the decision of the case of *Mott v. Ackermann*, 92 N. Y. 539. In this case, the will provided "on the death of my sister Maria, or as soon afterwards as they may think advisable, taking into view the condition of the country, and the probable increase in the value of the property, and within three years from the proof of this will, I authorize, empower and direct them (executors) to convert into money all my real and personal estate, which conversion shall be treated in law as if it had happened at the time of my sister's decease." It also devised and bequeathed to her sister Maria, for life, certain real and personal estate, after her death to U., subject to the payment of legacies specified. The suit was an action for specific performance of contract of sale made by an executor, who, during the proceedings died, thus making it necessary to decide whether the administrator *c. t. a.*, in whose name the suit was revived, could execute a deed to the premises, or a trustee should be appointed to execute the deed. The court said, "we have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute passes to and may be exercised by the

administrator with the will annexed. That is the case before us."

While this case does not in express terms overrule the cases of *Dominick v. Michael*, and *Conklin v. Egerton*, *supra*, it must be held to do so impliedly.

A testator devised all the residue "of his real and personal estate to his executors, upon certain trusts, viz.: To continue for two years a partnership; to lease his real estate, and to make sale of the same;" a subsequent clause of the will gave a discretionary power of sale over his real estate to his executors: *Held*, that the power did not pass to the administrator *c. t. a.*: *Ross v. Barclay*, 18 Penn. St. 179. So, where the will created a trust fund, appointing C. as trustee: *Ebert's Appeal*, 9 Watts 300. Where the will provided as to a particular lot, which was mortgaged to the testator, that his executors should buy it in on sale under the mortgage, and might sell the same as they thought best for the interests of his estate, the court citing, *Ross v. Barclay*, *supra*, said the administrator *c. t. a.* might exercise "a power to sell in order to bring the land into a course of administration, but not to carry out a trust for a collateral purpose, such, for instance, as here, to turn it into money for convenience of partition:" *Waters v. Margerum*, 60 Penn. St. 39. The cases of *Ross v. Barclay* and *Waters v. Margerum*, *supra*, especially the latter, are modified in a subsequent decision by the same court. The case arose on a suit by the administrator *c. t. a.* to recover the purchase-money on a sale of testator's land, to raise a fund for division among the heirs; the will gave discretionary power as to terms of sale to the executors, as such, and they were to divide and distribute the estate between testator's heirs; the court sustained the action, and held that a power of sale to turn real estate into money for purposes of partition and distribution passed to the administrator. A power "by deed to divide the real estate among the children, so that each should have an equal share of the productive and unproductive real estate, to be left entirely to the discretion of the executors without appeal," a power of partition of realty in specie, was held not to pass to the administrator *c. t. a.*: *Estate of Hepburn*, 8 Phila. 206. Where the will devised rents, profits and income of real estate to his six sons, and directed his executors "to pay all just debts and expenses out of the property aforesaid, and to pay all taxes and repairs which are absolutely necessary, and to divide the rents, profits and income of the real and personal property as aforesaid," on a settlement of

the accounts of the administrator *c. t. a.*, it was sought to charge him with the amount of rents received from real estate, and he sought credit for repairs made on the real estate, but both claims were disallowed, because it was said that the power over the realty did not pass, under the law, to the administrator *c. t. a.*: *Belcher v. Branch*, 11 R. I. 226. Where the will provided, "I desire that my executors may have full power and authority to sell or lease, or dispose of in any way they may think best for my estate, all my interests in any lands, &c.," there was a number of specific trusts in the will: *Armstrong v. Park's Devises*, 9 Humph. 195, 199, 206. The Supreme Court of Wisconsin follows the early decisions of New York state as to powers of the administrator *c. t. a.*: *In re estate of Besley*, 18 Wis. 451.

§ 10. *Meaning to be attached to "Discretion" and "Personal Trust and Confidence"*—*Miscellaneous Points*.—In many of the decisions the above words are frequently used, and in such a manner as often to confuse the casual reader. But, by recollecting what has been said in §§ 6 and 7, *supra*, the meaning of these words will be clear. An executor is a trustee, especially in equity; and these words are used indiscriminately by the courts in cases where the authority under discussion is a trust, and where it is annexed to the office. So it is that frequently the authority, although annexed to the office of executor, as such, calls for the exercise of just as much judgment, discretion and care as if vested in the executor as a trustee. The authority thus vested in the executor, *virtute officii*, is therefore distinguished into two kinds, viz.: 1. Mandatory or imperative, and 2. Discretionary: *Taylor v. Morris*, 1 N. Y. 341; *McDowell v. Gray*, 29 Penn. St. 211. This distinction, according to the most of the states, in the absence of any express enactment providing that the administrator *c. t. a.* may exercise the discretionary authority vested in the executor, does not affect his right of succession to the authority. So, where the will expressly required that *both* executors should agree to a sale of the realty, it was held that the power could be exercised by the administrator *c. t. a.*: *Meredith's Estate*, 1 Pars. Sel. Eq. Cas. 433. See also, *Evans v. Chew*, 8 Phila. 103; s. c. 71 Penn. St. 47; *Brown v. Armistead*, 6 Rand. 594; *Bailey v. Brown*, 9 R. I. 79; *Probate Court v. Hazard*, 13 R. I. 8. The statutes of *Alabama* and *Kentucky* expressly provide for such cases: *Gulley*

v. Prather's Adm'r, 7 Bush 167; *Shields v. Smith*, 8 Id. 601; *Anderson v. McGowan*, 45 Ala. 462.

A maxim of the common law is that, "the greater contains the less:" Broom's Legal Maxims 174. So, it is held, "a general power to sell will be conclusively presumed to be for the payment of debts:" *Chew v. Evans*, 8 Phila. 103; s. c. 71 Penn. St. 47; also for the payment of legacies: *Bailey v. Brown*, 9 R. I. 79. A sale made by an administrator *c. t. a.*, under the authority of an act passed *subsequently* to the probate of the will, is valid: *Blakemore v. Kimmons*, 8 Baxter 470.

As we have already seen, an administrator *c. t. a.* must be appointed *by a court* of competent jurisdiction: § 2, *supra*. The authority of any court cannot extend beyond the territorial limits of its sovereignty, and the laws of one state cannot govern the disposition of real estate situate in another state. It is therefore held, that an administrator with the will annexed, duly appointed by a court of competent jurisdiction in one state, cannot make a valid contract of sale of his testator's real estate situate in another state: *Wills v. Cowper*, 2 Ham. 124; *Simpson v. Hawkins*, 1 Dana 303.

When the authority is annexed to the office of the executor, a renunciation of that office deprives him of his authority: *Elstner v. Fife*, 32 Ohio St. 358, 369. As the authority which the administrator with the will annexed succeeds to is that which is annexed to the office of executor, his renunciation ends his authority to make sale or conveyance of his testator's real estate: *Elstner v. Fife*, *supra*, 372; *Owens v. Cowan's Heirs*, 7 B. Mon. 152, 157.

"When the mode of executing the power is not defined, it may be executed in any manner sufficient to convey the subject-matter, and the power need not be referred to in the instrument executing it:" 4 Kent's Com. 330, 333, 334; 1 Sugden on Powers 247, 404. "Executors having a general power of sale are not restricted to any particular mode of selling: *Huger v. Huger*, 9 Rich. (Ch.) 217, 221, 238; 2 Washb. R. P. 663; *Christy v. Pulliam*, 17 Ill. 59, 61; *Bonney v. Smith*, Id. 531, 533; *Bond v. Zeigler*, 1 Kelley 324. So where it was contended that an administrator *c. t. a.* should have sold at *public sale* instead of at *private sale*, there being *no provision in the will* in regard to the matter, the objection was not sustained: *Moss v. Moorman's Adm'r*, 24 Gratt. 96, 110.

§ 11. *Application of Purchase-money*.—"It has long been settled that either upon a trust or a charge a purchaser is not bound to see that the money is applied either to the payment of debts generally, or to the satisfaction of legacies out of the surplus after the debts are paid. The reason is, that it would defeat a sale if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts, which he would have no means of ascertaining. Legacies out of the fund stand on the same footing, because the purchaser would necessarily have to go through the administration of the assets and see at his risk that the debts are paid before he could let the legatees have anything:" *Hauser v. Shore*, 5 Ired. Eq. 357, 362; 2 Williams on Ex'rs 935; *Elliot v. Merryman*, 1 Lead. Cas. in Eq. 59, 67, and note, p. 112. "Like reason doth make like law:" Broom's Maxims 154. Accordingly the same rule would seem to extend to administrators *c. t. a.*; *Evans v. Chew*, 8 Phila. 103; s. c. 71 Penn. St. 47, 51.

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RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

ST. CLAIR STREET RAILWAY CO. v. EADIE.

A minor child, who being *sui juris* as to a reasonable care of her person and safety lawfully and properly enters into a conveyance driven by her parent, and without fault on her part is injured by the negligence of the driver of another vehicle, is not prevented from recovering damages against the proprietor of the latter vehicle, because her parent has by his negligence contributed to the injury.

Transfer Co. v. Kelly, 36 Ohio St. 86, followed. *Thorogood v. Bryan*, 8 C. B. 115, disapproved.

ERROR to the District Court of Cuyahoga County.

This was an action for damages for an injury alleged to have been caused by defendants' negligence. The plaintiff was a minor, aged sixteen years, and was fully capable of taking reasonable care of herself. She was lawfully riding with her father, who was driving his own wagon, when she was injured by a collision between the wagon and a street-car, caused by the mutual and concurring negligence of a street-car driver and her father, but without any fault or negligence on her part. The court below held that the negligence

of her father was not to be imputed or attributed to her, and did not bar a recovery against the street-car company, whose negligence directly contributed to the injury. The street-car company took this writ of error.

The opinion of the court was delivered by

JOHNSON, J.—The plaintiff, though a minor, was sixteen years old, and was, therefore, *sui juris*. She was fully capable of taking care of herself. Had her negligence or misconduct contributed to her injury, she could not recover, though the company was also guilty. The question fairly presented, therefore, is, whether a minor child, who being *sui juris* as to a reasonable care of her person and safety, lawfully and properly enters into a conveyance with her parent, and without fault on her part is injured by the negligence of a street railroad company, is prevented from recovering against such negligent company because her parent has, by his negligence, contributed to the injury. In *Transfer Co. v. Kelly*, 36 Ohio St. 86, this court held that the concurrent negligence of a street-car company, whose passenger the plaintiff was, with that of a transfer company, whereby there was a collision between the wagon of the latter with the car of the former, cannot be imputed to the passenger, so as to charge him with contributory negligence. In that case, as in this, the plaintiff was not in fault; but there, as here, it was contended that the plaintiff was so identified with, or related to, the railroad company by the contract of carriage that the fault of the carrier must be imputed to the passenger. Neither in that case nor in this was there any fault alleged against plaintiff for becoming a passenger. The two cases differ in two respects only. There the carriage was by a public carrier, presumably for hire or reward, while here it was by private conveyance, and presumably gratuitous. There the driver of the street-car was a stranger to the passenger, while here he was her father, with whom she was riding home. In that case it was held that the driver in the street-car was in no just sense the agent or servant of the passenger. If the driver had been under the control of the passenger, then it was said there might be some show of reason for holding the passenger liable for the negligence of the driver. But as there was no such power of direction or control, the negligence of the driver of the car could not be imputed to the passenger. That was held to be a case of joint negligence of the railroad company and the transfer company, for which they might be sued jointly or severally.

After a thorough examination of the numerous and conflicting authorities upon this point, some of which are cited in the opinion, we then declined to follow the case of *Thorogood v. Bryan*, 8 C. B. 115, and other like cases, which holds the passenger liable for the contributory negligence of his driver, where there was mutual fault of two drivers causing an injury, and, as before stated, held that upon principle, as well as upon the better authorities, the passenger was not so identified with the vehicle in which he was riding as to make him responsible for the driver's fault. It was held by us that the passenger in that street-car was not responsible for the negligence of the driver; that the latter was in no just sense the agent of the former, and had no control of, or direction over, the management of the vehicle in which he was riding, so as to identify driver and passenger.

The opposite doctrine, though supported by high authority, has not been received even in England with approbation.

We cite a few of the cases and text-books touching this vexed question, but, since the subject was fully considered in *Transfer Co. v. Kelly*, *supra*, we need not further consider it. See *Armstrong v. Lancashire Ry. Co.*, L. R., 10 Exch. 47; *Waite v. N. E. Rd.*, El., Bl. & El. 719 (a case of a child too young to take care of itself); *Lockhart v. Lichtenthaler*, 46 Penn. St. 151; Thompson on Carriers of Passengers, c. 7, where all the cases *pro* and *con* are cited, notes, p. 284; *Bennett v. N. J. Rd.*, 36 N. J. L. 221; 1 Smith's Lead. Cases (8th Am. ed.) p. 505, *315; *Danville Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Chapman v. N. H. Rd. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. Rd. Co.*, 20 Id. 492; *Louisville, etc., Rd. v. Case's Adm'r*, 9 Bush (Ky.), 728; Wharton on Neg. § 395; *Webster v. H. R. Rd. Co.*, 38 N. Y. 260.

The foregoing cases mostly relate to passengers by public carriers, and when the passenger is injured by the negligence of another public carrier, or of a third person.

It only remains to determine if a like rule applies when the plaintiff was passenger in a private conveyance. We think it does. The plaintiff in the case at bar was in no just sense the master, nor was her father her agent or under her control or direction. In *Puterbaugh v. Reasor*, 9 Ohio St. 484, the want of ordinary care of plaintiff's agent prevented his recovery, when the agent's negligence directly contributed to the injury, though the defendant was also guilty. But it is well settled that passengers in a public convey-

ance are not so liable for the negligence of the employees of the carrier, because they are not the agents of the passenger. The same reasons apply with equal force to a private carrier. Plaintiff's relations to her father being that of a passenger in his wagon, going to their common home, did not, in law, make him her servant or agent, and as such responsible for his misconduct. If he had brought an action for the loss of services of his daughter, caused by this injury, his contributory negligence would defeat a recovery, nor could he recover for his own injuries for the same reason. This is because he was guilty with the defendant of causing the collision. Neither does the fact that she was the daughter defeat her rights. If her father's misconduct or negligence contributed to the injury, why should that fact exonerate a joint wrongdoer? *Robinson v. N. Y. Cent. Rd.*, 66 N. Y. 11, was the case of a female who had accepted an invitation to ride with a gentleman, who was the owner and driver of a buggy in which they were riding, when she was injured through the joint negligence of her driver and a train of cars. CHURCH, C. J., says: "I am unable to find any legal principle upon which to impute to plaintiff the negligence of the driver. * * * The acceptance of an invitation to ride creates no more responsibility for the acts of the driver, than the riding in a stage coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver or the safety of the vehicle, or otherwise. It is no excuse for the negligence of defendant that another person's negligence contributed to the injury for whose acts the plaintiff was not responsible."

We think this reasoning unanswerable, notwithstanding the adverse criticism and contrary holding in *Prideaux v. City of Mineral Point*, 43 Wis. 513. This doctrine of "imputed negligence" and the reasons for its application were considered in *B. & I. Rd. Co. v. Snyder*, 18 Ohio St. 399. That was the case of a child six years old, and the negligence of the parent or custodian of the child did not prevent its recovery against one also guilty. The court say the rule that contributory negligence bars a recovery is founded on, 1. The mutuality of the wrong; 2. The impolicy of allowing a party to recover for his own wrong; and 3. The policy of making personal interests of parties depend on their own prudence and care. It was said all these were wanting in the case then before the court. With equal truth it can be said that all these rea-

sons are wanting in the present case, where it is conceded the plaintiff was in no fault. Whether in this case the father would have been jointly liable with defendant, we need not now determine. By the well-settled rule of law he would be, unless his relation to her modifies this rule, for his culpable negligence, she being *sui juris* and not guilty of want of proper care for her own safety: *Boyd v. Watt*, 27 Ohio St. 259; Whart. on Neg. § 144; Shear. & Redf. on Neg. § 58.

If it be conceded that he would not be so liable, either by reason of his parental relation or that it was a gratuitous service, that would not excuse the negligence of the defendant, nor bar the plaintiff, who was free from fault, from recovering from the other wrongdoer, whose negligence was a proximate cause of injury.

Judgment affirmed.

As is well known to the profession, the English case of *Thorogood v. Bryan*, 8 C. B. 114, 122, holds a different doctrine from that of the principal case. In that case it is held that a passenger upon an omnibus of a common carrier who receives injuries caused from the concurring negligence of such carrier and a third person, is not entitled to recover damages from the third person, for the reason that the passenger is so identified with the carrier and his servants, that the negligence of the carrier is to be imputed to the passenger, i. e., that such passenger contributed to his own injury. This doctrine has been expressly repudiated in a number of well-considered cases in this country: nor has it been received with approbation in England: *Waite v. North Eastern Ry.*, El., Bl. & El. 728; *Tuff v. Warman*, 2 C. B. (N. S.) 750.

In *The Milan*, 1 Lush. 388, 403, the judge of the High Court of Admiralty, in speaking of *Thorogood v. Bryan*, said: "With respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case: because I know, upon inquiry, that it has been doubted by high authority: because it appears to me not

reconcilable with other principles laid down at common law: lastly, because it is directly against *Hay v. Le Neve*, 2 Shaw's S. C. App. 405, and the ordinary practice of the Court of Admiralty."

Greenland v. Chaplin, 5 Exch. 242, and *Rigby v. Hewitt*, Id. 240, cases decided after *Thorogood v. Bryan*, do not follow the doctrine of the latter case.

In a note to *Ashby v. White*, 1 Smith's Lead. Cas. (6th Am. ed.) 450, we find the following: "If two drunken stage-coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury of his own carriage, no doubt; but it seems highly unreasonable that each set of passengers should, by a fiction, be identified with the coachman who drove them so as to be restricted for remedy to actions against their own drivers or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood v. Bryan*, 8 C. B. 115, but it may be questioned whether the reasoning in that case is consistent with those of *Rigby v. Hewitt*, 5 Exch. 240, and *Greenland v. Chaplin*, Id. 243, or with the series of decisions from *Quarman v. Burnett*, 6 M. & W. 499, to *Reedie v. London, &c., Ry.*, 4 Exch. 244, and *Dalyell v. Tyrer*, 28 L. J. (Q. B.)

52. Why in this particular case both wrongdoers should not be considered liable to a person, free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than is received in *Thorogood v. Bryan*."

Child v. Hearn, L. R., 9 Exch. 176, 182, and *Armstrong v. Lancashire, &c.*, Ry., L. R., 10 Id. 47; s. c. 44 L. J. (Exch.) 89, seem to approve of the doctrine of "anomalous identification" of *Thorogood v. Bryan*.

The doctrine of *Thorogood v. Bryan*, rests on the ground that the plaintiff having voluntarily trusted himself on the omnibus, had so identified himself with its management, that the driver's negligence deprived him of any right of action against the owner of the other vehicle.

The general principle applicable is that the contributory negligence of a third person does not constitute a defence, unless such negligence is imputable to the plaintiff: *Burrows v. March Gas & Coke Co.*, L. R., 5 Exch. 67; *Sheridan v. Brooklyn, &c., Rd.*, 36 N. Y. 39; *Cayzer v. Taylor*, 10 Gray 274; *Mott v. H. R. Rd.*, 8 Bosw. 345. Such contributory negligence is not to be imputed to the plaintiff, unless such third person is under his direction or control, as agent or servant. This doctrine rests on the familiar maxim, "*qui facit per alium, facit per se*," and is just. When this relation of principal and agent, or master and servant is complete, the contributory negligence of such agent or servant is always to be imputed to his principal or master. *Puterbaugh v. Reasor*, 9 Ohio St. 484, well illustrates this rule. There the injury resulted from the concurring negligence of two servants, one being the servant of the plaintiff. The plaintiff was not permitted to recover for the reason that his servant, over whom he had control, contributed to the injury, such negligence being fairly imputed

to him; see *Otis v. Thom*, 23 Ala. 469.

The doctrine of *Thorogood v. Bryan*, *supra*, seems to have been adopted in Pennsylvania in *Lockhart v. Lichtenthaler*, 46 Penn. St. 151, 165. There the injury resulted from the mutual negligence of the servants of both vehicles, the one in which plaintiff was riding, being a public conveyance, he having no control over the driver of it, yet the court held that his driver alone was responsible for the injury. But while adopting the doctrine, the court refused to follow the reason of the English case. THOMPSON, J., said: (p. 164) "I would say the reason for it, that it better accords with the policy of the law to hold the carrier alone responsible in such circumstances as an incentive to care and diligence. As the law fixes the responsibility upon a different principle in case of the carrier, as already noticed from that of a party who does not stand in that relation to the party injured, the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own. It would be altogether more just to hold liable him who has engaged to observe the highest degree of diligence and care and has been compensated for so doing, rather than upon him upon whom no such obligation rests, and who not being compensated for the observance of such a degree of care, acts only on the duty to observe ordinary care, and may not be aware even of the presence of a party, who might be injured. This rule, it cannot be doubted, will be more likely to increase diligence than the opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on another, which he would assuredly do if the temp

tation and opportunity offered. As this view accords best with the policy of the law, it is proof of the existence of the rule itself." The court after reviewing fully the decisions concludes that the clear preponderance is in favor of the doctrine that mutual negligence in case of an injury to a third person is a defence.

In Pennsylvania this doctrine was again affirmed in *Phila. & Reading Rd. v. Boyer*, 97 Penn. St. 91, 100, where death was caused by collision of a street car that deceased was on, and a locomotive of defendant. The court stated that the success of the action depended upon two assumptions: (1) That death resulted directly from the carelessness of the defendants' servants: (2) That the person in charge of the street-car was chargeable with no negligence. "It is on this hypothesis that suit can be maintained, for the rule is, that where a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it, and another party, the carrier alone must answer for the injury: *Lockhart v. Lichenthaler*, *supra*."

But the better rule is that where the negligence is joint, he may recover from either, or both. This rule is supported by the weight of authority: *Colegrove v. Rd.*, 20 N. Y. 492; s. o. 6 Duer 382; *Webster v. Hudson*, 38 N. Y. 260; *Davey v. Chamberlain*, 4 Esp. 229; *Wharton on Neg.* § 395; *Barratt v. Rd.*, 45 N. Y. 628. *Danville, &c., Tp. v. Stewart*, 2 Met. (Ky.) 119, lays down the rule that where an injury is occasioned by the negligence of two persons, the fault of one is no excuse for that of the other. Both in such case are liable to the party injured; following the principle of this case is *Louisville, &c., Rd. v. Case*, 9 Bush (Ky.) 728, 735.

In *Tomkins v. Clay Street Hill Railroad Co.*, 4 West Coast Rep. 537; s. c. 4 Pac. Rep. 1165, plaintiff was injured by being thrown from a street-car which

collided with another. The servants of both cars were responsible for the accident. It was held that plaintiff could recover from either or both companies, and where both are sued, the plaintiff may ordinarily dismiss as to either, and, if it turns out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other; but satisfaction received from one company, is a bar to an action against the other. The court said: "Every party contributing to the injury of plaintiff was liable to the full extent of damages by her sustained. Her injuries gave her but a single cause of action. * * * Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant:" *Urton v. Price*, 7 Pac. C. L. J. 82; 57 Cal. 272; *Cooley on Torts* 139.

Chapman v. New Haven Rd., 19 N. Y. 341, is against *Thorogood v. Bryan*, also. The plaintiff was a passenger on a New York and Harlem train. The injury occurred by collision of his train with another train, through concurring negligence of the managers of the respective trains. It was held that the passenger was not so identified with the proprietors, or their servants, of the train conveying him as to be responsible for negligence on their part, and therefore he could recover from defendant. Referring to *Thorogood v. Bryan*, *JOHNSON, C. J.*, said (p. 344), "But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff has no control, management, even no advisory power over the train on which he was riding. Even as to selection he has the choice of going by that railroad or none. To attribute to him therefore the negligence of the agents of the company and thus bar him of a right of recovery is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the origi-

nal exception, and is based on fiction and inconsistent with justice."

We find a still stronger denunciation of the doctrine of *Thorogood v. Bryan* in *Bennett v. N. J. Rd. & Tr. Co.*, 36 N. J. L. 225. The plaintiff while riding on a street car was injured by carelessness of engineer of defendant and contributory negligence of driver of street car. The plaintiff was held entitled to recover. BEASLEY, C. J., in referring to *Thorogood v. Bryan*, said, "This case stands, I think, in point of principle, alone in the line of English decisions, and the grounds upon which it rests seem to me inconsistent with familiar rules. The reason given for the judgment is, that a passenger in the omnibus must be considered as identified with the driver of the omnibus in which he is voluntarily a passenger, and that the negligence of the driver is the negligence of the passenger. But I have entirely failed to perceive how it is that the passenger in a public conveyance becomes identified, in any legal sense, with the driver of such conveyance. Such identification could result only in one way; that is, by considering such a driver the servant of the plaintiff. I can see no ground upon which such relationship is to be founded. In a practical point of view it certainly does not exist. The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servants. To hold that the conductor of a street car or a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction. In reality there is no such agency, and if we impute it, and correctly apply legal principles, the passenger, on the occurrence of an accident from the carelessness of the person in charge of the vehicle in which he is being conveyed, would be without any remedy. It is obvious in a suit against the proprietor

of the car in which he was a passenger, there could be no recovery if the driver or conductor of such car, is to be regarded as the servant of such passenger. And so, on the same ground, each passenger would be liable to every person injured by the carelessness of such driver or conductor; because if the negligence of such agent is to be attributed to the passenger for one purpose, it would be entirely arbitrary to say that he is not to be affected by it for other purposes. * * The doctrine of the English case appears to convert the driver of the omnibus into the servant of the passenger for the single purpose of preventing the passenger from bringing suit against a third party whose negligence had co-operated with that of the driver in the production of the injury. I am compelled to dissent from such a position. Under the circumstances in question, the passenger is a perfectly innocent party, having no control over either of the wrongdoers; and I can see no reason why according to the usual rule an action will not lie in his behalf against either or both of the employers of such wrongdoers."

Louisville, &c., Rd. v. Case's Adm'r, 9 Bush (Ky.) 728, holds a contrary doctrine from *Thorogood v. Bryan*. Here the passenger was in a street-car and lost his life by collision of his car with a railroad train of defendant, occasioned by concurring negligence of the driver of street-car and the servants of defendant. There was a recovery, as the driver was held not to be a servant of the passenger, nor subject to his government or control. In this case it was said (p. 735), "Notwithstanding the driver of the street-car may have recklessly driven across the track of the railroad company in dangerous proximity to the moving train, still the servants of the company, so soon as it became apparent that he intended to do so, were under obligations to the passengers on the street-car to use all proper efforts to arrest the progress of the train, and prevent, if possible, the

collision; but as it is much more difficult to control the movements of a heavy train of cars than to check a single street-car drawn by mules or horses, the employees of the railroad company could not anticipate that the driver of the street-car would attempt to cross the street in the face of the advancing train, and consequently could not be expected to take steps to arrest an unexpected danger until it became manifest that the driver intended to act contrary to the course usually adopted by persons of reasonable prudence under like circumstances. But the negligence of the driver will not excuse negligence on the part of the railroad employees. If the life of Case was destroyed by the concurrent negligence of two or more persons, none of whom were acting as his agent or servant, nor subject to his government or control, all the employers of the guilty agents may be held responsible for the injury, and one cannot plead the negligence of the servants of the other as matter of defence in an action against himself. This doctrine was announced by this court in *Stewart's Case*, 2 Met. (Ky.) 119, and it is in harmony with the reason of the law, and we are not inclined to depart from it, although a different rule appears to have been followed in one English and a few American cases."

In *Cuddy v. Horn*, 46 Mich. 596, (s. c. 21 Am. L. Reg. N. S. 302, and note), the injury was caused by collision of two steamers, through mutual negligence of managers of each. One of the vessels had been chartered, but the charterer did not control the movements of the boat. The action was against the owners of both vessels, and was sustained, citing *Colegrove v. Rd.*, 20 N. Y. 492; *Cooper v. E. T. Co.*, 79 Id. 116; *Hillman v. Newington*, 57 Cal. 56.

PRIVATE CONVEYANCES.—Many cases have made a distinction between public and private conveyances, but others have

refused to recognise any difference in the principle of the doctrine.

The grounds for this distinction are well stated by RYAN, C. J., in *Prideaux v. Mineral Point*, 43 Wis. 513, 526. In that case plaintiff was riding in a private conveyance at the invitation of the driver, and it was held that the driver was the agent of the plaintiff whose negligence was imputable to him. RYAN, C. J., said (p. 528), "One in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance for the time being as one's own, and assumes the risk of the skill of the person guiding it. *Pro hac vice*, the master of a private yacht or the driver of a private carriage is accepted as agent by every person voluntarily committing himself to it. When *pater familias* drives his wife and child in his own vehicle he is surely their agent in driving them, to charge them with negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the direction of each against negligence affecting the common safety. One enters a private conveyance in some sort of free choice; voluntarily trusting to its sufficiency and safety. It appears absurd that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway, to the care and skill exercised in all other vehicles upon it, to the care and skill governing trains at railroad crossings, to the care and skill of everything except that which is most im-

mediately important to himself, and trusts nothing to the sufficiency of the very vehicle in which he voluntarily travels, nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appears to sanction this view." See *Houfe v. Fulton*, 29 Wis. 296. *Otis v. Janesville*, 47 Id. 422, follows *Prideaux v. Mineral Point*, *supra*, and holds that the contributory negligence of the driver of a private conveyance in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured, to prevent a recovery.

This distinction has also been taken in Michigan. In *Lake Shore, &c., Rd. v. Miller*, 25 Mich. 274, 287, a female servant was riding with her employer in his wagon, which was wrecked by a railroad train of defendant. The driver of the wagon appeared to have been guilty of negligence directly contributing to the injury against which the plaintiff warned him. This negligence was held to be imputed to the plaintiff, so as to preclude a recovery.

Iowa has also adopted this rule. In *Payne v. C., R. I. & P. Rd.*, 39 Iowa 523, the action was for injuries received at a railroad crossing of defendant by collision of a wagon with defendants' train. The wagon was driven by a third person and plaintiff was a voluntary passenger therein. It was held that the plaintiff was bound to rely upon the diligence of the driver for a recovery.

This distinction was adopted in one New York case—*Brown v. N. Y. Cent. Rd.*, 31 Barb. 385—but denied in others. In *Robinson v. N. Y. & H. R. Rd.*, 66 N. Y. 11, a female accepted an invitation to ride in a buggy with a person who was entirely competent to manage the horses. While crossing the defend-

ant's railroad track the buggy collided with defendant's train. It was held that if she was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury. This case is criticised by RYAN, C. J., in *Prideaux v. Mineral Point*, *supra*.

The New York case, *Robinson v. Rd.* *supra*, is approved in *Dyer v. Erie Ry.* 71 N. Y. 228. In that case plaintiff was injured while crossing defendants' railroad track in a public thoroughfare, while riding by permission and invitation of a third person, the owner of the horses and wagon driven. It was held that as no relationship of principal and agent arose between the plaintiff and the driver of the vehicle, the former was not responsible for the negligence of the latter, where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the train. This case affirms that of *Robinson v. Rd.*, *supra*, and puts this principle at rest in New York.

In *Metcalf v. Baker*, 11 Abb. Pr. Rep. (N. S.) 431; s. c. 2 Jones & Sp. 10, plaintiff was riding gratuitously in A.'s carriage, who was driving at the time of the accident, which was caused by collision of A.'s carriage with defendant's wagon, which was driven by defendant's servant. Both drivers contributed to the injury. The plaintiff was held entitled to recover, citing and approving *Colegrove v. N. Y. & H. R. Rd.*, 6 Duer 382; s. c. 20 N. Y. 492.

In *Knapp v. Dagg*, 18 How. Prac. 163, plaintiff was riding as a passenger in her brother's wagon, when they met and collided with the defendant's wagon, she being thrown out and injured, the accident being occasioned by mutual negligence of both drivers, without any blame on part of plaintiff unless in riding with a careless driver. She was held not to be chargeable with the negligence of her driver. The court said (p. 165): "The

plaintiff is not chargeable with the negligence of the driver of the team after which she rode. She could have sued him for the injury she has sustained. The defendant is guilty of injuring her as well as he is. They have severally wronged her. She might sue either." It was said in *Brown v. Rd.*, *supra*, that this case was not good law, but *Robinson v. Rd.* *supra*, and *Dryer v. Erie Ry.*, *supra*, settle the rule this way in N. Y.

The principal case fully sustains the New York rule.

EUGENE McQUILLEN.

[Since the receipt of the above note a decision of the Court of Errors and Appeals of New Jersey has been published in which that court also declines to adopt the rule laid down in *Thorogood v. Bryan*. See N. Y., *L. E. & West. Rd. v. Steinbrenner*, 18 Vroom 161, *ante*, p. 684.—ED.)

Supreme Court of Indiana.

GLIDDEN v. HENRY.

A promissory note containing the clause, "the drawers and endorsers * * * expressly agree that the payee or his assignees may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit," is non-negotiable.

APPEAL from Henry Circuit Court.

Millett & Bundy, for appellant.

J. M. Morris, for appellee.

The opinion of the court was delivered by

ZOLLARS, J.—For value, and before maturity, appellee became the owner of two promissory notes executed by appellant, one of which is as follows:

\$750.

New Castle, Ind., April 14th 1883.

Twelve months after date we, or either of us, promise to pay to the order of George W. Nugen, Jr., seven hundred and fifty dollars, with interest at the rate of seven per cent. per annum, after date, until paid, and attorney fees, value received, without any relief whatever from valuation or appraisal laws, with eight per cent interest from maturity. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, and further, expressly agree that the payee or his assignees may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit, and receive interest in advance, or otherwise, from the maker or endorsers, for any extension or forbearance so made. Negotiable and payable at the Citizens' State Bank of New Castle.

J. W. GLIDDEN.

So far as is material here, the other note is the same. Appellee brought this action to recover the amount of the notes, and to foreclose the mortgage given by appellant to secure them. The questions for decision are presented by the ruling of the court below in sustaining a demurrer to appellant's answers, and the assignment here that that ruling was erroneous. If the notes are negotiable as inland bills of exchange, the demurrer was properly sustained, because the defences set up in the answers are such as cannot be made as against the *bona fide* holder of such paper. We are therefore met at the threshold with the question, are these notes negotiable as inland bills of exchange? In section 5506, Rev. St. 1881, it is provided that "notes payable to order or bearer, in a bank in this state, shall be negotiable as inland bills of exchange, and the payees and endorsees thereof may recover as in case of such bills." This statute does not provide what shall constitute a promissory note. The term "note" is used as it was under the law-merchant in the commercial world: *Melton v. Gibson*, 97 Ind. 158. The sole purpose of the section was to put a limitation upon section 5503, and provide for commercial paper that might circulate free from defences in favor of the maker. This is accomplished by the provision that, if the note be payable at a bank in this state, it shall be negotiable as inland bills of exchange. The note, then with the addition prescribed by the statute, must be such as would have been negotiable under the law-merchant without any statutory provision. Are the notes in suit such as would have been thus negotiable? A standard author has said: "To learn what qualities are essential to a negotiable promissory note, we must bear in mind the purpose of the note, and of the law in relation to it. This is simply that the note may represent money, and do all the work of money in business transactions. For this purpose, the first requisite—that, indeed, which includes all the rest—is certainty. This means certainty.— * * * Second, as to the person or persons who are to make this payment, and the order and conditions of their liability. * * * Fourth, as to the time when payment is to be made. * * * It will be seen that the law endeavors to enforce, define and protect all these certainties as far as possible," &c. Par. Bills & Notes 30. See, also, 1 Daniel Neg. Inst. § 41. This same general doctrine of the books is recognised by this and all other courts: *Walker v. Woollen*, 54 Ind. 164. In this case it was said: "A note, in order that it may be negotiable in accordance with the law-merchant, must be payable

unconditionally and at all events, and at some fixed period of time, or upon some event which must inevitably happen."

Were it necessary we might cite numerous decisions by this court asserting the general doctrine of certainty as necessary to a promissory note under the law merchant. The difficulty is not as to the general doctrine, but the application of it to each case as it arises. In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in twelve months, but that promise is not certain and unconditional. The other clause is that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature, because it is impossible to know what extension may have been or may hereafter be agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is, not that something may happen or be done that will mature the note before the time named, thus leaving that time as fixed and certain, if the thing do not happen or be not done, but the condition is that the time named may be displaced by another uncertain and indefinite time, as the parties may agree. This distinguishes the case from some of the cases cited by appellee, which hold that so long as a definite time of payment, as fixed in the note, remains fixed and certain, the note retains its negotiability, although by certain agreed conditions it may be matured before that time. The case here is also distinguishable from another class of cases which hold that the time of payment may be dependent upon an event that must inevitably happen, such as the death of the maker, the coming of the seasons, &c.

The precise question involved here has been passed upon by the Supreme Courts of Iowa and Michigan, and in each case it was held that the condition destroyed the negotiability of the note: *Woodbury v. Roberts*, 59 Iowa 348; *Smith v. Van Blarcom*, 45 Mich. 371; see, also, *Cook v. Satterlee*, 6 Cow. 108; *Gillilan v. Myers*, 31 Ill. 525; *Costelo v. Crowell*, 127 Mass. 293. We conclude from the foregoing that the notes in suit are not negotiable under the statute as inland bills of exchange, and that, therefore, whatever defences appellant might have set up and made available as against Nugen, the payee, he may set up and make available as against appellee. Appellee concedes that the first answer is sufficient if the notes in his hands are subject to defences by appellant. A

holding, therefore, that the notes are thus subject to defences, is a holding that the court below erred in sustaining the demurrer to all of the answers. Appellant's counsel have directed the whole of their argument to the proposition that the notes are open to defences, and have said nothing in support of the answers. The first answer is clearly good, as it sets up an entire want of consideration for the notes. For the sustaining of the demurrer to this answer, the judgment must be reversed. There is nothing in the notes nor in the mortgage that can operate as an estoppel, as against appellant, to make this defence.

As there is no discussion of the other answers, we observe simply that the second answer, setting up an extension of the time of payment, is not good as a plea in bar. If such an extension may be made available, as we think it may be in this case, it should be brought forward as a plea in abatement. And under our present statute (section 365, Rev. St. 1881) such answer must precede, and cannot be pleaded with, an answer in bar. As to the third answer, in which there was an attempt to make available as a defence the fact that Nugen was not the owner of an undivided one-third of the land covered by the mortgage, it is sufficient to say that the plea does not make a defence either upon the ground of fraud, or upon the ground that there was a breach of warranty.

The judgment is reversed with costs.

Speaking of a promissory note, it was said that "it must be an absolute promise, in writing, signed, but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer :'" *Druke v. Markle*, 21 Ind. 435, citing *Byles on Bills* 4. This is substantially the definition of the books and cases: *Daniels on Negotiable Instruments*, sect. 30; *Story on Notes*, sects. 20-22; *Benjamin Chalmers's Digest*, art. 271; *Hays v. Gwin*, 19 Ind. 19; *Miller v. Austen*, 13 How. (U. S.) 218; 1 *Pars. Notes and Bills* 42; *Chitty on Bills* 134.

Requisite as to time of Payment.—The principal case turned upon the question whether or not the time of payment was made certain by the words used; and it

was held that it was not, and consequently the note was not negotiable.

Story says a note "must be payable absolutely, and at all events, and not be subject to any condition or contingency:" *Story on Notes*, sect. 20-22.

"It is an essential requisite of a promissory note, that there must be certainty as to the fact of payment. It must be payable at all events, and not dependent upon a condition or contingency:" *Titlow v. Hubbard*, 63 Ind. 8; *Hays v. Gwin*, 19 Ind. 21.

"A note, in order that it be negotiable in accordance with the law-merchant, must be payable unconditionally, and at all events, and at some fixed period of time, or upon some event which must inevitably happen:" *Walker v. Woollen*, 54 Ind. 166; *Walters v. Short*, 10 Ill.

259; *Whiteman v. Bliss*, 24 Id. 170; *Cook v. Satterlee*, 6 Cow. 108.

"A written engagement by one person, to pay absolutely and unconditionally to another person therein named, or to his order, or to the bearer, a certain sum of money, at a specified time, or on demand, or at sight:" *Hall v. Farmer*, 5 Denio 486.

In the view of this rule, what instruments have and have not been held negotiable with reference to the time of payment?

First.—A bill or note may be payable on demand, as "when demanded," or "at any time when called for:" *Kingsbury v. Butler*, 4 Vt. 458; *Bowman v. McChesney*, 22 Gratt. 609. Or it may be payable "in such instalments, and at such time as B. (the payee) may require;" this being nothing more than the demand of the payee, and if complied with is a payment on demand: *White v. Smith*, 77 Ill. 351. In the case cited the note was payable in such instalments as the directors of the payee company might assess or require; see also *Protection Ins. Co. v. Bill*, 31 Conn. 534. And a note payable in instalments not to exceed ten per cent. on each note, at thirty days, notice of call from board of directors was upheld; *Stillwell v. Craig*, 58 Mo. 24; also, a note "payable in such manner and proportion, and at such time and place as B. shall require," being payable on demand: *Goshen v. Hurin*, 9 Johns. 217; see *Washington Co. Mutual Ins. Co. v. Miller*, 26 Vt. 77. But not to pay at such times, and in such articles as A. may need for support: *Corbitt v. Stonemetz*, 15 Wis. 170. Payable "on demand, with interest after four months" is good: *Loring v. Gurney*, 5 Pick. 15. See *First Nat. Bank v. Price*, 52 Iowa 570; *Hobart v. Dodge*, 1 Fairf. (Me.) 156. If no time of payment is specified, it is understood that the note is payable on demand: *Thompson v. Ketcham*, 9 Johns. 189; *Abbott v. Douglass*, 1 C. B. 491; *Herrick v. Bennett*, 8 Johns. 374; *Al-*

dous v. Cornwell, L. R., 3 Q. B. 573; *Gaylord v. Van Loan*, 15 Wend. 308; *Whitlock v. Underwood*, 2 B. & C. 157; *Cornell v. Moulton*, 3 Denio 12; *Stover v. Hamilton*, 21 Gratt. 273; *Keyes v. Fenstermaker*, 24 Cal. 329; *Green v. Drehillis*, 1 Ia. 552; *Freeman v. Roberts*, 15 Ga. 215; *Dodd v. Denny*, 6 Ore. 157; *Kendall v. Galvin*, 15 Me. 131; *Bacon v. Page*, 1 Conn. 404; *Jones v. Brown*, 11 Ohio St. 601; *Porter v. Porter*, 51 Me. 376. And if payable "—months after date," it is payable on demand: *McLean v. Nichol*, 3 Victorian L. R. 107.

Second.—A note or bill may be payable "at sight" or at a certain fixed period "after sight." (This term is seldom applied to a note.) The instrument is payable at sight when it is expressed to be so payable, or "on presentation," or "on demand at sight:" *Dixon v. Nuttall*, 1 Cr., M. & R. 307. So a promise to pay a certain sum after six months' notice is good; for a time certain may be fixed by giving notice: *Walker v. Roberts*, Car. & Marsh. 590; *Gayles v. Hibbard*, 5 Biss. 99; *Dutchess Co. v. Davis*, 14 Johns. 238.

Third.—A bill or note may be made payable at a fixed future time; at a fixed period after date; at a fixed future period after sight; or at a time certain to transpire though indefinite; *Colehan v. Cooke*, Willes 393; *Cota v. Buck*, 7 Met. 588.

The time, however, when the note is payable, must certainly come, although the particular day need not be mentioned in the note. Thus the following has been held not to render a note non-negotiable: "I promise to pay A., or bearer, one hundred dollars, one year from date, with annual interest; and if there is not enough realized by good management in one year, to have more time to pay, in the manufacture of the plaster bed on B.'s land." It was said that the only uncertainty was as to the length of time to be given, and that "uncertainty the

law makes certain by giving him a reasonable time thereafter (the time prescribed) to make the payment:" *Capron v. Capron*, 44 Vt. 420.

Likewise a note was held to be negotiable that provided that it was "to be paid as soon as collected from my accounts at B.;" for the phrase did not make the debt conditional, but only provided that a reasonable time was to be allowed for the collection of the accounts: *Ubsdell v. Cunningham*, 22 Mo. 124. So a note payable on demand after date "when convenient" was held valid and payable absolutely in a reasonable time: *Works v. Hershey*, 35 Ia. 340; *Lewis v. Tipton*, 10 Ohio St. 88; so a note payable "as soon as I can:" *Kincard v. Higgins*, 1 Bibb (Ky.) 396. A note payable "from the avails of logs bought of B., when there is a sale made:" *Sears v. Wright*, 24 Me. 278; or "when I sell my place where I now live," has been held, in Maine, payable absolutely after a reasonable time: *Crooker v. Holmes*, 65 Me. 195. Likewise, a note payable in six months, "or as soon as I can with due diligence make the money out of said patent right:" *Palmer v. Hummer*, 10 Kans. 464; s. c. 15 Am. Rep. 353; *contra*, *Hubbard v. Mosely*, 11 Gray 170; or "as B.'s horse earns the money in the cavalry service;" *Gardner v. Barger*, 4 Heisk. 669; "or sooner if made out of a certain sale:" *Ernst v. Steckman*, 74 Penn. St. 13; s. c. 15 Am. Rep. 542; *Woollen v. Ulrich*, 64 Ind. 120; *Noll v. Smith*, Id. 511; *Cornell v. Nebeker*, 58 Id. 425; *Walker v. Woollen*, 54 Id. 165; s. c. 23 Am. Rep. 639; *Cisne v. Chidester*, 85 Ill. 523; has been held negotiable: *Charlton v. Reed*, 61 Ia. 166; s. c. 47 Am. Rep. 808.

A note payable "as soon as realized," to which was added, "to be paid in the course of the season now coming, was held to be an undertaking to pay absolutely. It was said: "Whatever time may be understood by the coming season, whether harvest-time or the coming year,

it must come by mere lapse of time, and that must be the ultimate limit of the time of payment:" *Cota v. Buck*, 7 Met. 588. Likewise a certificate payable "on the return of this certificate," is negotiable: but adding "and the return of my guaranty" of a certain note engrafts a collateral condition which defeats the negotiability of the instrument: *Smilie v. Stevens*, 39 Vt. 316; *Blood v. Northup*, 1 Kans. 29.

So a note may be expressed to be payable, in effect, in a reasonable time. Illustrations of this rule have elsewhere been given. Thus a note payable "when convenient" was upheld; for the court could say what is a reasonable time, and the phrase used meant nothing else: *Capron v. Capron*, 44 Vt. 410; (*contra*, *Nunez v. Dautel*, 19 Wall. 560); *Work v. Hershey*, 35 Ia. 340; *Lewis v. Tipton*, 10 Ohio St. 88; (*contra*, *Ex parte Tooltell*, 4 Ves. 372. Or "when I sell my place:" *Crooker v. Holmes*, 65 Me. 195; or "to be paid as soon as collected from my accounts at P.:" *Ubsdell v. Cunningham*, 22 Mo. 124. As we have seen a note payable when A. becomes of age, is non-negotiable, for he may never attain his majority; but if the date of that prospective attainment were mentioned it would be different: *Goss v. Nelson*, 1 Burr. 226. But a note payable at or within a certain time after a man's death is not objectionable, for the man will certainly die: *Cooke v. Colehan*, 2 Stra. 1217; *Colehan v. Cooke*, Willes 393; *Roffey v. Greenwell*, 10 A. & E. 222; *Conn v. Thornton*, 46 Ala. 587; *Mortee v. Edwards*, 20 La. Ann. 236; even if made payable after the death of the maker: *Bristol v. Warner*, 19 Conn. 7; as "one day after date, or at my death:" *Conn v. Thornton*, 46 Ala. 587.

In England a note made payable a certain time after a government-ship is paid off was held valid; for the government is sure to pay: *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262. But this case has been se-

very criticised in this country: 1 Pars. N. & B. 40; Edwards on Bills & Notes 142.

So a negotiable note may be made payable in instalments, and provide that if there is a failure to pay any one instalment when due, the whole note shall become due and collectible. It is like a note or bill payable a certain time after sight: *Carlton v. Kenealy*, 12 M. & W. 139. See *Miller v. Biddle*, 13 L. T. Rep. 334, and *Wright v. Irwin*, 33 Mich. 32; *Cooke v. Horne*, 29 L. T. (N. S.) 369; *Sea v. Glover*, 1 Bradw. 335. So a note payable in the sum of one hundred dollars "by two equal instalments, due Aug. 1st and Oct. 1st," is valid: *Garkins v. Davis*, 2 F. & F. 294; see *Saunders v. McCarthy*, 8 Allen 42; or "in such manner and proportion, and at such a time and place as he shall require," as we have seen: *White v. Smith*, 77 Ill. 351; see *Colgate v. Buckingham*, 39 Barb. 177; but not "by instalments," not stating date: *Moffatt v. Edwards*, 1 Car. & M. 16. So a note payable "to B. or order, \$1000, by ten equal instalments, payable, &c., all instalments to cease on the death of A.," is invalid: *Worley v. Harrison*, 3 A. & E. 669.

During the late Rebellion, notes were given sometimes payable a certain time after peace, or when peace should be declared. Thus a note payable "six months after peace is declared between the United States and the Confederate States of America," was held actionable six months after peace ensued: *Brewster v. Williams*, 2 S. O. 455; *Mortee v. Edwards*, 20 La. Ann. 236; *Gaines v. Dorsett*, 18 Id. 563. But this view has been denied: *McNinch v. Ramsey*, 66 N. C. 229; and it may well be doubted if they are negotiable: 1 Daniels Neg. Inst. sect. 49.

If a note is payable at a time certain, its negotiability is not destroyed because it is payable on or before that time; or "on or before one year from date:" *Helmer v. Krolick*, 36 Mich. 371. "The

legal rights of the holder are clear and certain; the note is due at a time fixed, and it is not due before. True, the maker may pay sooner if he shall choose, but this option if exercised would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiability is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon reason:" *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *Jordon v. Tate*, 19 Ohio St. 586; *Smith v. Ellis*, 29 Me. 422; *Curtis v. Horn*, 58 N. H. 504; *Ernst v. Steckman*, 74 Penn. St. 17; s. c. 15 Am. Rep. 542. The doctrine of these cases applies to the case of a note payable by May 10th "or when A. completes" a certain building "according to contract," for the time fixed, May 10, is the ultimate day when it falls due: *Stevens v. Blunt*, 7 Mass. 240; *Goodloe v. Taylor*, 3 Hawks 458.

A note given for a machine and containing the clause that "the payee or his endorsee has full power to declare this note due and take full possession of said property at any time they may deem themselves insecure, even before the maturity of this note, and sell the same where this note is payable, on five days' notice in writing," is not negotiable because the amount recoverable is uncertain: *Smith v. Marland*, 59 Ia. 645; see *Deering v. Thom*, 29 Minn. 120.

So the negotiability of a note payable "on or before two years from date," is destroyed by a memorandum attached thereto providing that if paid within one year, there shall be no interest; because the amount is uncertain: *Lamb v. Story*, 45 Mich. 488.

If a note is payable only on condition that certain terms be complied with, it is non-negotiable. Such is the case if the note is made payable, if a certain railroad be built to a certain point by a time

named : *Blackman v. Lehman*, 63 Ala. 547 ; *Eldred v. Mulloy*, 2 Col. 320 ; or if a certain act be done : *Appleby v. Beddolph*, 8 Mod. 363 ; or if another person shall not previously pay : *Roberts v. Peake*, 1 Burr. 323 ; or if a certain receipt be produced : *Mason v. Metcalf*, 4 Bax. 440 ; (contra, *Frank v. Wessels*, 64 N. Y. 158), because return of the receipt was not the essence of the contract ; or if a certain ship shall arrive : *Coolidge v. Ruggler*, 15 Mass. 387 ; *Palmer v. Pratt*, 2 Bing. 185 ; *Grant v. Wood*, 12 Gray 220 ; see *Pinkham v. Macy*, 9 Met. 174 ; or if the maker be able : *Ex parte Tooltell*, 4 Ves. 372 ; *Salimas v. Wright*, 11 Tex. 572 ; or "when A. shall marry : " *Pearson v. Garrett*, 4 Mod. 242 ; *Beardsley v. Baldwin*, Stra. 1157 ; or "when a certain sale is made : " *De Forest v. Frary*, 6 Cow. 151 ; *Hill v. Halford*, 2 B. & P. 413 ; "or when a certain suit is determined : " *Shelton v. Bruce*, 9 Ga. 24 ; "or certain divisions disclosed : " *Brooks v. Hargreaves*, 21 Mich. 255 ; or "when the estate of A. is settled up : " *Husband v. Epling*, 81 Ill. 172 ; or upon an event not inevitable : *Tradesman's Bank v. Green*, 57 Md. 602 ; or "when a certain amount is collected : " *Corbett v. State*, 24 Ga. 287 ; or "after arrival and discharge of coal by the brig C. : " *Grant v. Wood*, 12 Gray 220 ; or "payable subject to the policy : " *American Exchange Bank v. Blanchard*, 7 Allen 332 ; or subject to a certain contract ; *Cushing v. Field*, 70 Me. 50 ; or "as per agreement : " *Bank of Sherman v. Apperson*, 4 Fed. Rep. 25 ; (contra, *Jury v. Barker*, El. & Bl. & El. 459) ; or "given as collateral security with an agreement : " *Costello v. Crowell*, 127 Mass. 293. In each of these instances the note was held non-negotiable ; for the events upon which the maturity of the note depends may never happen.

So an instrument payable in instalments, where no time for the instalments falling due is told, is not a negotiable note : *Moffat v. Edwards*, Car. & M.

16. In England a note payable ninety days after sight or when realized, was held not to be a note ; as we have seen it has been held otherwise in this country : *Alexander v. Thomas*, 16 Q. B. 333.

So a note payable when a certain party arrives at age, is not negotiable ; and it makes no difference that he is of age at the time of suit : *Kelley v. Hemmingway*, 13 Ill. 604 ; and the same is true if made payable six months after the dissolution of the partnership between A. & B., and the settling of the books : *Sackett v. Palmer*, 25 Barb. 179 ; or when a certain building is completed : *Miller v. Excelsior Stone Co.*, 1 Bradw. (Ill.) 273 ; see *Stevens v. Blount*, 7 Mass. 240.)

So a note given with a mortgage payable in a year, or a year and a half from date "or sooner, at the option of the mortgagor, with interest at six per cent. during the term of the mortgage," is not negotiable ; for it is not payable at a definite time, or at a time that can be made definite at the election of the holder : *Stults v. Silva*, 119 Mass. 137 ; *Way v. Smith*, 111 Id. 523. Likewise of bonds issued by a company containing the clause "The company reserve the right to pay the same at any time by adding to the principal a sum equal to twenty per cent. thereof : " *Chouteau v. Allen*, 70 Mo. 339.

So a note payable on the happening of two events, one of which may not happen, is not negotiable : *Massie v. Belford*, 68 Ill. 290 ; and the same is true if a part of it is for a sum certain and a part upon a contingency : *Palmer v. Ward*, 6 Gray 340.

The principal case is amply supported by the cases cited in the opinion. In *Smith v. Van Blaricum*, cited, it was said : "There is nothing on the face of the note whereby any one can tell, either directly or by reference to any particular event, at what period this paper will become absolutely payable. We cannot

conceive how this can be treated as not payable on a contingency." This is supported by *Woodbury v. Roberts*, cited; s. c. 44 Am. Rep. 685. Of a note in another instance it was said: "This divests it of the quality of certainty in the time of payment, which, as we have shown, is one of the essential elements of negotiability. The time of payment may be lessened at the option of the payee, and is therefore uncertain." This note contained a clause allowing

the payee to declare the note due at any time he deemed himself insecure; and it was held non-negotiable: *First Nat. Bank v. Bynum*, 84 N. C. 24; s. c. 37 Am. Rep. 604. See *Morgan v. Edwards*, 53 Wis. 599; s. c. 40 Am. Rep. 781; *Mahoney v. Fitzpatrick*, 133 Mass. 151; 43 Am. Rep. 502; *Miller v. Poage*, 56 Ia. 96; s. c. 41 Am. Rep. 82.

W. W. THORNTON.

Supreme Court of Iowa.

VIMONT v. CHICAGO AND N. W. RAILWAY CO.

A cause of action for a tort is assignable so as to vest in the assignee a right of action in his own name.

J., who was injured by the negligence of defendant railroad company, assigned his claim for damages to V., who executed the following agreement: "In consideration of the assignment to me by C. O. Johnson of his claim for damages against the Chicago & Northwestern Railway Company, resulting to him by reason of an injury received by him on or about the thirty-first day of August 1881, on said railway, I hereby agree to dispose of the entire amount realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advances of money I may make I am to retain thereof the sum of fifty dollars; I am also to retain all sums of money that I may advance in the prosecution of said claim; next, I agree to pay out of the proceeds of said recovery the reasonable fee of the attorneys and agents employed to prosecute said claim on such fee therefor as may be agreed upon, if any agreement for a specific amount shall be agreed upon, and the balance of said recovery I agree to pay to the said C. O. Johnson." Held, that the cause of action was assignable; that the assignment and agreement did not constitute barratry, champerty, or maintenance; and that V. was entitled to maintain an action for damages against the railway company in his own name.

In such an action, even if it should appear that the assignment was colorable and fraudulent, the assignor need not be made a party to the action.

Where an assignment of a cause of action is legal and valid, the fact that it was made for the express purpose of depriving defendant of the right to remove the case to a federal court on the ground of citizenship, will not invalidate it or entitle defendant to such removal.

APPEAL from Polk Circuit Court.

The plaintiff, as assignee of one Johnson, brought this action to recover damages for a tort committed by the defendant. The latter moved the court to require Johnson to be made a party to the action. This motion was overruled, and the defendant appeals. The latter

afterwards filed a motion to transfer the cause to the federal court. This motion was sustained, and the plaintiff appealed.

Nourse & Kauffman, for plaintiff.

N. M. Hubbard and *W. S. M. Clark*, for defendant.

The opinion of the court was delivered by.

SEEVERS, J.—*As to the defendant's appeal.*—The petition states that C. O. Johnson was a passenger on one of the defendant's trains, and because of the negligence of the defendant he was injured and entitled to recover damages therefor. The nature and extent of the injuries are stated, and that Johnson had assigned his claim and right of action to the plaintiff, wherefor judgment was asked. The defendant pleaded: First, a general denial of the allegations of the petition; second, "that the assignment was colorable, collusive, and fraudulent, and made for the purpose of depriving defendant of its right to remove the cause to the federal court;" and, third, "that the assignment of the claim by Johnson, together with the assignment executed at the same time by Vimont, constitutes barratry, champerty and maintenance, and is void for that reason." The agreement executed by the plaintiff at the time the assignment was made is in these words:

"In consideration of the assignment to me by C. O. Johnson of his claim for damages against the Chicago & Northwestern Railway Company, resulting to him by reason of an injury received by him on or about the thirty-first day of August 1881, on said railway, I hereby agree to dispose of the entire amount realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advances of money I may make I am to retain thereof the sum of fifty dollars. I am also to retain all sums of money that I may advance in the prosecution of said claim. Next, I agree to pay out of the proceeds of said recovery the reasonable fee of the attorneys and agents employed to prosecute said claim, or such fee thereof as may be agreed upon, if an agreement for a specific amount shall be agreed upon. And the balance of said recovery I agree to pay to the said C. O. Johnson.

WM. H. VIMONT."

The defendant also pleaded that the assignment was made and completed in Illinois, and that by the laws of that state the assign-

ment is void, and that it is illegal and void under the laws of Iowa. The defendant moved the court to make an order requiring said Johnson to be made a party plaintiff, on the ground that no determination of the controversy could be made unless said Johnson was a party to the record. And, in support of the motion, the defendant introduced the deposition of the plaintiff showing the agreement taken back at the time of the assignment was as above set forth: "That the plaintiff paid said Johnson no money, and don't know him; that the assignment was procured by his attorneys, Nourse & Kauffman—Mr. Nourse being his brother-in-law; that he had no knowledge of this claim prior to receiving information in regard to it from Nourse & Kauffman."

Is an action for a tort assignable so as to vest in the assignee a right of action in his own name? In *Weire v. City of Davenport*, 11 Iowa 49, it was held that a right of action for a tort could be sold and transferred at common law, and in *Gray v. McCallister*, 50 Iowa 497, it was held that a claim for a personal tort, which dies with the party, could be sold or transferred like any other cause of action. See, also, *Small v. Railroad Co.*, 50 Iowa 338. We are not disposed to depart from the rule established in these cases, therefore the assignment in this case is valid under the law of this state. The laws of Illinois were not introduced in evidence in this case and are not, therefore, before us. In the absence of proof to the contrary it must be presumed that the laws of that state are the same as those of Iowa. This we have held in several cases.

The assignment of the claim vested the legal title thereto in the plaintiff. Being such owner, he legally is the real party in interest, and the statute requires that the action for the recovery of such claim must be brought in the name of the said party. Code, § 2543. But it is urged that the assignment is colorable, and does not vest the right to maintain this action in the plaintiff, because of the agreement made at the time of the assignment whereby he agreed to pay a portion of the amount recovered and realized to Johnson, the assignor. If the assignment vested the legal title to the claim in the plaintiff it would seem that, ordinarily, he, as such owner, should have the right to do what he pleased with it. Besides this we understand this identical question was made and determined in *Knadler v. Sharp*, 36 Iowa 232, adversely to the defendant, and no adequate reasons having been adduced why that case should

be overruled we therefore follow it. We may further remark that it was held in *Small v. Railroad Co.*, before cited, that champerty and maintenance are not a defence to the action. We therefore are of the opinion the plaintiff can maintain this action.

It is said as it may be determined the assignment is colorable, fraudulent, and void, that a complete determination of this case cannot be made unless Johnson is made a party. Johnson filed a paper in response to the motion in which he disclaimed any interest in the prosecution of this action, and stated in substance that he did not own the claim, but that he had assigned it to the plaintiff. If it should be determined on the trial, that the defendant had not been negligent, such adjudication would be binding on Johnson, and the controversy would be finally ended; but, if the plaintiff should be defeated on the ground that he did not own the claim, or that the assignment was colorable and fraudulent, it may be that Johnson could maintain an action thereon. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights: but when a determination of the controversy between the parties before the court cannot be made without the presence of other parties the court must order them to be brought in:" Code, § 2551. The rights of others cannot be prejudiced by whatever determination is made between these parties. Those of Johnson certainly cannot be, but if they should, he would clearly be estopped from complaining. It is urged, however, that the defendant would be prejudiced if compelled to again litigate the questions involved with Johnson.

We do not think, conceding this to be so, that such prejudice would be of a legal character, for the reason that the statute does not seem to so contemplate. In actions at law, if the controversy can be determined, without prejudice to the rights of others, between the parties to the action, this, ordinarily, is all that can be required. The motion, therefore, was properly overruled.

As to the plaintiff's appeal. After the determination of the foregoing motion the defendant filed a petition for the removal of this action to the federal court. It is in the following words: "That the defendant is, and was at the date of the commencement of this suit, a citizen of the state of Illinois; that William H. Vimont, plaintiff herein, was also, at and ever since the commencement of this suit, has been a citizen of the state of Illinois; that C. O.

Johnson is the real party plaintiff, and is the party that received the injury ; and that for the sole purpose of avoiding the jurisdiction of the federal court, said Johnson made said pretended assignment of said claim to said William H. Vimont, and received back the written contract set out in defendant's answer ; that said assignment and contract were made in Illinois, and that, by the laws of the state of Illinois, the assignment is invalid and insufficient for said William H. Vimont to maintain an action thereon in the state of Illinois ; that the assignment and contract between said Vimont and said Johnson are barratrous and champertous, and against public policy and void, as appears by defendant's answer herein ; that said C. O. Johnson is the real party in interest as plaintiff, and was, at and before the commencement of this suit, and still is, a citizen of the state of Iowa, and prays that said C. O. Johnson be made a party plaintiff in this suit ; that there is and was at the date of the commencement of this suit a controversy between petitioner and the said Johnson, the real plaintiff, and that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and that the present term of this court is the first term at which the case could be tried. * * * Petitioner offers a bond with surety and prays," the court to order the action to be removed, &c.

The act of Congress under which the removal is sought, provides that where there is a controversy between the citizens of different states, and the amount in controversy exceeds \$500, exclusive of costs, the action may be removed from the state to the federal court. Does the record show that there is such a controversy? We have held that Johnson is not a necessary party, but that the plaintiff can maintain this action. It then follows, we think, that there is not, and cannot be in this action any controversy except between the plaintiff and defendant, who are both residents of Illinois, and therefore, as between them, the right of removal does not exist. But counsel for the defendant claim that it appears from the record that the assignment of the claim by Johnson to the plaintiff was made for the express purpose of depriving the defendant of the right to remove the action to the federal court. The petition for the removal so states. But the plaintiff, in what is designated as an answer thereto, denied that Johnson was the real plaintiff, and denied that the assignment was made for the purpose stated in the answer. But it is said that we can only look to the facts stated in the petition, and must disregard anything stated by the plaintiff.

For the purpose of this case it will be conceded this is true, where the petition states merely the citizenship of the parties, and the amount in controversy—that is to say, simply the jurisdictional facts; but where it goes beyond this, and states that some one not a party to the record is the real party, and thus alleges facts that have the effect to bar the right of the plaintiff to recover in any court, we think a different rule must prevail. We therefore cannot say that the record shows the plaintiff is entitled to maintain this action; for that question is controverted, and the plaintiff is entitled to have it tried and determined in the ordinary manner.

But conceding that the object of the assignment was to deprive the defendant of the right to remove the action to the federal court, yet it had the effect to vest the legal title to the claim in the plaintiff. He legally owns and controls it, and if the action is tried on the merits, the judgment is conclusive against the world. There is no law which prohibits the assignment. Clearly, the Act of Congress does not do so. It cannot, therefore, be a fraud on the rights of the defendant. At most, the defendant has been deprived of a right in a manner not prohibited by law. The assignment does not have the effect to cut off any defence the defendant may have. This case is clearly distinguishable from *Browne v. Strode*, 5 Cr. 303, and *McNutt v. Bland*, 2 How. 10. It has been held that when trustees are personally qualified by citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified: *Coal Co. v. Blatchford*, 11 Wall. 172; *Knapp v. Railroad Co.*, 20 Id. 123. The converse of this proposition must be true. The results of the litigation belong to the parties beneficially interested. The trustees in one sense are mere conduits; but as they control the litigation, and are legally the owners of the cause of action, they are entitled to maintain the action.

We do not understand *Jones v. League*, 18 How. 76, conflicts with the foregoing views. In that case the question was whether there had been a change of citizenship, so that the federal courts had jurisdiction. The court said: "The change of citizenship, even for the purpose of bringing suit in the federal court, must be with the *bona fide* intention of becoming a citizen of the state to which the party removes." This case recognises the right of a party to change his residence, although it may be done for the express purpose of affecting the jurisdiction of the federal courts.

The motive or intent, therefore, of the change is immaterial. So, in the present case, the fact that the assignment was made to deprive the federal court of jurisdiction is immaterial. The assignment was in fact made. It was authorized by law, and the assignment of a promissory note or any other chose in action may have precisely the same effect; that is, the legal effect of the assignment of a chose in action may deprive or give the federal courts jurisdiction, though not contemplated by the parties. It does not seem to us that it can make any difference if the assignment of the chose of action was made with the specific intent which would result from the act done by operation of law. In the concluding paragraph of the opinion in the case last cited it is said the conveyance or assignment in that case must be "*bona fide*, so that the prosecution of the suit shall not be" for the benefit of the assignor. No such question was before the court in that case, and we hardly think it was meant that where a party had legally divested himself of all title to the subject of the action, that the fact he might be interested in the result of the litigation would affect the jurisdiction of the courts; but rather that if the assignor has retained such interest in the cause of action as will enable him to control the litigation for his benefit, then the jurisdiction of the courts will be affected by reason of such fact.

On the defendant's appeal the judgment of the circuit court is affirmed, and on the plaintiff's appeal, reversed.

By the strict rules of the old common law choses in action could not be assigned or granted over, ¹ because it was thought to be a great encouragement to litigiousness, if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded; though, in compliance with the ancient principle, the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor in order to recover the possession. And therefore, when in common acceptance, a debt or bond is said to be assigned over, it must still be sued in the original creditor's name, the person to whom it is transferred being rather an attorney than an assignee." 2 Bl. Com. 442; Co. Litt. 214. Although many choses in action

may be transferred or assigned so as to vest the beneficial interest in the transferee or assignee, using the latter term in its popular sense, yet the rule, where unchanged by statute, is, with a few exceptions, still as above stated by Blackstone, and the action must be brought in the assignor's name, to the use of the assignee: Bouv. Law Dict. Assignment; Smith on Cont. 269. There were, however, even at the common law, certain exceptions to this rule. By the law merchant bills of exchange were transferable by indorsement, if payable to order, and by delivery if payable to bearer, so as to enable the holder to sue in his own name; and by the 3 & 4 Anne, c. 9, generally re enacted in this country, promissory notes were placed upon the same footing. The statute of Illinois and a few other states upon this subject

are peculiar. See Rev. Stat. ch. 98, sect. 4.

So; though it was once doubted, an annuity which "is a yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only" (Co. Litt. 144 b) is assignable at common law. As Co. Lit. 144 b, states it, "not only the grantee, but his heir and his and their grantee also shall have a writ of annuity." See note (1) same page; 2 Vin. Abr. 515; 3 Id. 151; *Gerrard v. Boden*, Hetl. 80; *Maunder's Case*, 7 Co. 28 b; *Baker v. Broke*, Moore 5; s. c. Dy. 65, pl. 1.

So, it has been held that a grant of a franchise to a town, as the right of a fishery, may be the subject of a legal assignment, and that the assignee may sue in his own name: *Watertown v. White*, 13 Mass. 477.

If covenants running with the land be made by the owner of land, who conveys his entire interest to the covenantee, they are annexed to the estate, and the assignee of that estate may bring his action on the covenants in his own name: 1 Pars. Cont. *231.

Covenants between landlord and tenant, lessee and reversioner, run with the land. If one who owns in fee conveys to another a less estate, as a term for years, and enters into covenants with the grantee, which relate to the use and value of the property granted, the right of action for a breach of the covenants which the grantee has, passes to his assignee, so long as this less estate continues: 1 Pars. Cont. 232.

Looking at the above so-called exceptions, it will be seen that in contemplation of law some estate or interest other than a mere naked *chose in action* passes; and doubtless an assignment of arrears of an annuity and not the annuity itself, as well as of a cause of action for a breach of a covenant running with the land, &c., would not enable the assignee to sue in his own name.

The king, and as it seems the United States, or a state, may receive an assignment of a *chose in action*, and sue thereon in his or their, own name: 2 Bl. Com. 442; Co. Litt. 232 b, n. 1; *United States v. Buford*, 3 Pet. 30.

The term *chose in action* embraces demands arising out of a tort, as well as those arising out of a contract: 2 Kent. Com. 351; *Gillett v. Fairchild*, 4 Den. 80.

Causes of action *ex delicto* may be subdivided into those affecting the person and those affecting property. Torts to the person are of two kinds, those resulting in the death of the person injured, and those not resulting in death.

At the common law no civil action would lie for causing the death of a human being: Cooley on Torts 15, 262. This rule of the common law was in 1846 changed in England in certain cases by what is known as Lord Campbell's Act, which has served as a model for the numerous statutes in this country. See, generally, Cooley on Torts 263-274.

In general, it may be affirmed that mere personal torts which [at common law] die with the person, and do not survive to the personal representative, are not capable of passing by assignment, and conversely causes of action that survive to the personal representatives are assignable, not indeed so as, independent of statute, to enable the assignee to sue in his own name, but so as to entitle him to the beneficial interest therein: *Comegys v. Vasse*, 1 Pet. 213; *Final v. Backus*, 18 Mich. 218; *North v. Turner*, 9 S. & R. 244; *Butler v. N. Y., &c., Rd. Co.*, 22 Barb. 110; *Purple v. Hudson Rd. Co.*, 4 Duer 74; *Waldron v. Willard*, 17 N. Y. 468; *McKee v. Judd*, 12 N. Y. 622; *Rice v. Stone*, 1 Allen 566; *Jordan v. Gillen*, 44 N. H. 424; *Grant v. Ludlow*, 8 Ohio St. 1; *The People v. Tioga C. P.*, 19 Wend. 73. As to what causes of action die with the person Blackstone (3 Com.

302) says; "In actions merely personal arising *ex delicto* for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is that *actio personalis moritur cum persona*; and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descended to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors; being, indeed, rather actions against the property than the person, in which the executors have now the same interest that their testator had before."

"In the case of injuries to the *person*, whether by assault, battery, false imprisonment, slander or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives; for the statute 4 Ed. 3, c. 7 (A. D. 1330) has made no alteration in the common law in that respect, and the statute 3 & 4 W. 4, c. 42, § 2 (A. D. 1833), only gives executors and administrators an action for *torts to personal or real estate* of the party injured, and not for mere injuries to the person:" 1 Chit. Plead. 68.

Accordingly, it is held that a claim for injuries to the person is not assignable before final judgment: *Averill v. Longfellow*, 66 Me. 237; *McGlinchy v. Hall*, 58 Id. 152; *Rice v. Stone*, 1 Allen 566; *Stone v. Boston, &c., Rd. Co.*, 7 Gray 539; *Linton v. Hurley*, 104 Mass. 353.

In the case of the *People ex rel. Stanton v. Tioga Common Pleas*, 19 Wend. 73, it was held that a *chose in action* for

a tort merely personal (debauching the plaintiff's servant) is not assignable so that a court of law will protect the assignee against the subsequent fraudulent discharge of the damages recovered in a suit prosecuted for such tort, although the tort-feasor accept the discharge with full knowledge of the assignment. The remedy of the assignee in such case is by action against the assignor for breach of his express or implied undertaking not to do anything in the matter to prejudice the assignee.

"At common law, in case of injuries to personal property, if either party died, in general, no action could be supported, either by or against the personal representatives of the parties, where the action must have been in form *ex delicto*, and the plea not guilty; but if any contract could be implied, as if the wrongdoer converted the property into money, or if the goods remained in specie in the hands of the executor or the wrongdoer, assumpsit for money had and received might be supported at common law by or against the executors in the former case, and trover against the executor in the latter. By the statute 4 Ed. 3, c. 7, entitled 'executors shall have an action of *trespass*, for a *wrong* done to the testator,' and reciting 'that in times past executors have not had actions for a *trespass* done by their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished,' it was enacted 'that the executors in such cases shall have an action against the trespassers, and recover the damages in like manner as they, whose executors they be, should have had if they were in life;' and this remedy is further extended [by the statutes 35 Ed. 3, c. 5; and 31 Edw. 3, c. 11] to the executors of executors, and to administrators:" 1 Chit. Plead. 68, 69. "The statute has been construed to extend to every description of injury to *personal property*, by which it has been

rendered *less beneficial* to the executor, whatever the form of action may be; so that an executor may support trespass or trover, case for a false return to final process, and case or debt for an escape, &c., on final process:” 1 Chit. Plead. 69.

With respect to injuries to *real* property, if either party die no action in form *ex delicto* could be supported either by or against his personal representatives before the 3 & 4 W. 4, c. 42, § 2,” which enacted, “that an action of trespass or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for an injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person,” with a limitation as to the time of the injury and of bringing the action. This statute enacted further “that an action of trespass or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal,” with a limitation as to time of the injury and of bringing the action: 1 Chit. Plead. 69, 70.

The statute 4 Edw. 3, c. 7, has been held to be in force in Pennsylvania and in Massachusetts: Roberts’ Dig. 248; *Report of the Judges*, 3 Binn. 610; *Wilbur v. Gilmore*, 21 Pick. 252.

It is law in the state of Illinois: Rev. Stat. Ill. c. 28, sect. 1: and doubtless, also, in many other states, if not all.

Accordingly, it is held that a cause of action for the destruction, taking or conversion of goods and chattels which survives the party and goes to the personal representatives, is assignable: *Robinson v. Weeks*, 6 How. Pr. 161; *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Id. 201; *Brady v. Whitney*, 24 Id. 154; *North v. Turner*, 9 S. & R. 244; *Jordan v. Gillen*, 44 N. H. 424. It is believed that the Michigan statute al-

lowing the assignee to sue in his own name, does not affect this question. See *Hodgman v. Western Rd. Co.*, cited *infra*.

But though assignable so as to vest the beneficial interest in the assignee, even a cause of action for injury to the property cannot, independent of statute, be assigned, so as to vest the *legal* title to the claim in the assignee: *Chicago, &c., Rd. Co. v. Maher*, 91 Ill. 312.

As to the assignment of *choses in action*, in some of the states statutes have been enacted enabling the assignees of the beneficial interest in a *chose in action* generally (including those arising *ex delicto*) to sue thereon in their own name. See *Final v. Backus*, 18 Mich. 218, 231; *Hodgman v. Western Rd. Co.*, 7 How. Pr. 492. But it has been held that this legislation creates no new right of action, and that no authority is thereby given to assign a right of action which was not before assignable.

Thus, in *Hodgman v. The Western Rd. Co.*, *supra*, it was held that under such a statute a right of action for personal injuries received by the collision of cars upon a railroad, was not assignable, so as to enable the assignee to sue in his own name, and that the action could only be maintained by the party injured. In delivering the opinion of the court, HARRIS, J., said: “At common law no mere right of action was so assignable as to pass the *legal* right to the assignee. When it affected the *estate* of the assignor, though the legal right still remained in the assignor, so that the action must be prosecuted in his name, the court exercising its equity powers, would protect the rights of the assignee. The only change made by the code in this respect, is to transfer with the beneficial interest the right of action also in these cases, where before, the court would recognise and protect the rights of the assignee. No new right of action is created; no authority is given to assign a right of action which was not before assignable.

When the right of action is of such a nature as not to be the subject of a contract, as in the case of a violation of a personal or a relative right, it cannot be assigned. The action can only be maintained by the party who has been injured, and when he dies the right of action also dies. Every right of action involving life, health or reputation, belongs to this class. So a right of action founded upon a breach of promise of marriage, being in the nature of a personal injury, cannot be transferred. On the other hand, where the injury affects the estate rather than the person, where the action is brought for damage to the estate, and not for personal suffering, the right of action may be bought and sold. Such a right of action upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of the assets, because it affects his estate, and not his personal or relative rights. Of course such a right of action is assignable, and under the provisions of the code, the assignee is the proper party to maintain action upon it: *People v. Tioga Common Pleas*, 19 Wend. 73; *Robinson v. Weeks*, 6 How. Pr. 161; *Chamberlain v. Williamson*, 2 M. & S. 408; *Flynn v. Hudson River Rd. Co.*, 6 How. Pr. 308;

Comegys v. Vasse, 1 Pet. 213; and 1 Chit. Pl. 68, are cited by the court to sustain the rules above stated. See also *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Id. 201; *Brady v. Whitney*, 24 Id. 154.

Section 2525 of the Iowa Code provides that "all causes of action shall survive and may be brought, notwithstanding the death of the person entitled or liable to the same." See the rule applied in *Safer v. Grimes*, 23 Ia. 550 (an action for seduction); *Carson v. McFadden*, 10 Id. 91 (an action for libel); *McKinlay v. McGregor*, Id. 111 (injury to the person by decedent).

From what has been already said, and from the above cited statute it seems clear that in Iowa, contrary to the general rule, causes of action for tort whether to the person, which at common law died with the person, or to property, are assignable; and since by the code, sect. 2543, "every action must be prosecuted in the name of the real party in interest, except as provided in the next section," which does not affect the question, it seems equally clear that the action was correctly brought in the name of the assignee.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Pennsylvania.

WEST PHILADELPHIA PASSENGER RAILWAY CO. v. GALLAGHER.

It is not contributory negligence *per se* for a passenger to ride on the lower step of the front platform of a crowded street-car without objection by the driver or conductor.

A boy of fourteen got upon the lower step of the front platform of a crowded street-car, and rode for a long distance as a passenger, holding on with but one hand. He was finally knocked off by the jolting of the car, run over and injured. In an action against the street-car company to recover damages: *Held*, that the questions of negligence and contributory negligence, taking into consideration the age and capacity of the lad, were both for the jury.

The absence of a guard or fender on the front platform of a street-car is a fact

which may be taken into consideration with other facts in determining the question of the company's negligence. The court will not, however, say, as matter of law, that it is negligence on the part of the company not to furnish such a guard.

ERROR to the Common Pleas No. 4, of Philadelphia County.

Case, by James S. Gallagher, a minor, by his next friend Rudolph Steinle, against the West Philadelphia Passenger Railway Company, to recover damages for personal injuries, caused by the alleged negligence of the company defendant. Plea, not guilty.

On the trial, the following facts appeared :—

The plaintiff, a boy of thirteen years, got on a car of the defendant company, which was very much crowded. He took a position on the lower step of the front platform, holding on by only one hand, with his left foot on the step, and the right one on the platform ; in this position he rode for twenty-two squares with safety, but when near his destination lost or let go his hold, and losing his balance, on reaching the ground fell, so that his leg got under the wheel, was crushed, and necessarily had to be amputated near the knee-joint. The car was a two-horse one, and the driver collected the fares. It had no guard or fender to the front platform, and at the time of the accident was travelling at a rapid speed over a portion of the road on the down grade, which made the car rock ; the testimony of plaintiff's witnesses was to the effect that the car was going no faster than ordinarily for that part of the road in the open country, and that while the car rocked, it was the usual rocking motion at that rate of speed.

The court below left it to the jury to say whether the boy had sufficient knowledge and discretion to understand the danger he assumed, and whether he assumed that danger voluntarily. The court also charged that if the boy was pushed off by the ordinary pressure of a crowd of passengers, or the efforts of the passenger to get off, that being the usual and ordinary pressure that might be expected in a crowded car, then the company would be liable as having omitted the precautions that a company ought to take to protect its passengers situated as this boy was. The court further charged that while it had not been established as matter of law that it was the duty of a railway company to put gates on the front platforms, the omission to do so was a fact to be taken into consideration by the jury, and if they were of opinion that a gate or fender would have prevented the accident, they were at liberty to say that the company was careless in omitting to have it.

Verdict for plaintiff for \$8000, and judgment thereon. Whereupon defendant took this writ, assigning for error, *inter alia*, that portion of the charge above cited.

Rufus E. Shapley, for plaintiff in error.

L. C. Cleeman and *Pierce Archer*, for defendant in error.

The opinion of the court was delivered by

TRUNKEY, J.—There is little conflict of testimony respecting the number of passengers on the car at the time the plaintiff was hurt. The person who acted as conductor says there were between forty-five and fifty, eight or nine of whom were on the front platform. Passengers, whether called by the plaintiff or defendant, agree that the car was crowded, and that more might have got on; the conductor thinks he could have shoved on seventy, and then it would have been pretty well packed. He also testifies that eight or ten boys were on the car, and that he saw none of them standing on the step of the front platform, nor on the platform itself, except in the door. While the car ran from Forty-first street to Sixty-second, the plaintiff stood on one of the front steps, and either the crowd or something else kept him from the conductor's view. Had the conductor seen him he might have considered it his duty, under the rules of the company, to have placed him in a position of greater safety. It appears that the rocking motion of the cars was increased by the platforms being loaded with passengers; also that the car at the time of the accident was running down grade, quite as fast as the usual rate of speed when the passengers could all be seated. One of the witnesses, who had been a driver on that road, says the rocking was not unusual with a loaded car, but was unusual with a car not so heavily loaded. The front platform was without gates or fenders. The plaintiff was nearly thirteen years and two months old.

The fact that the front platform was not enclosed with a screen or fender is a matter proper to be considered, with other facts in the case, in determining whether or not the defendant was guilty of negligence in allowing the front door to remain open, and the front platform to be crowded with passengers, some of whom were children. It was the duty of the defendant to exercise reasonable care and vigilance to carry the plaintiff safely. If on account of the plaintiff's age and inexperience, he was incapable of taking pro-

per care of himself, the defendant was bound to exercise the high care and vigilance necessary and proper to secure his safety: *Phila. City Pass. Ry. Co. v. Hassard*, 75 Penn. St. 367. These principles apply to the duty of passenger railway companies in relation to passengers, and are not militated by rulings in cases where children got on or attempted to get on the front platform under circumstances which, had they been of mature age, would have shown them both trespassing and negligent, and which showed no negligence on the part of the companies.

There is no absolute rule as to what constitutes negligence. Where a higher degree of care is demanded under some circumstances than under others, when the standard shifts with the circumstances of the case, when both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven: *Crissey v. Railway Co.*, 75 Penn. St. 83. Where concurrent negligence is alleged, a child will not be held to the exercise of the same degree of care and discretion as an adult. The law does not presume that an infant is responsible for negligence until after he arrives at fourteen years of age: *Nagle v. Railroad Co.*, 88 Penn. St. 35.

It has been ruled in this and other states that it is not negligence *per se* for a passenger to ride on the front platform of a crowded car with consent of the driver or conductor. Why should negligence be imputed to him? The railway companies invite passengers to get on, receive the fare, and thus hold out the platform as a safe place for passengers. That it is as safe as the inside of the car nobody pretends. But the carrier who receives the passenger and the compensation for carrying him, does not allege contributory negligence in the passenger for taking the place provided; he alleges that the place is safe with due care and vigilance. Then the carrier is bound to higher care and vigilance when the platform is crowded with passengers, in proportion as that place is more dangerous than a seat inside the car. And the passenger on his part must exercise proper care under the particular circumstances. A boy may have much intelligence and discretion for one of his age, and still should not be held to the measure of care that ought to be exercised by a man of ordinary judgment.

When the evidence warrants a finding that the passenger, a boy, rode two miles on the step of the front platform without having been seen by the conductor, the platform full of passengers, the car

going at the usual speed of one not overloaded, and the rocking motion so great as to attract the attention of numerous passengers, the case is one for the jury to determine whether the company exercised due care under the circumstances. And this aside from the testimony of the boy himself respecting the pushing or jostling against him by the crowd from the time he got on the car until his fall. But his testimony was for the consideration of the jury. The learned judge of the Common Pleas committed no error in refusing to charge that "upon the whole evidence in this case the verdict must be for the defendant."

With a single exception, we are of opinion that the defendant (plaintiff in error) has no ground to complain of the rulings of the court below, and that exception is the instruction set out in the third assignment, which must be sustained. After stating that it has been ruled that the absence of gates, or fenders, or screens is a fact to be taken into the consideration by the jury in determining the question of negligence on the part of the defendant, the court charged: "If, therefore, you are of opinion that a fender or guard put upon that car, or, if upon that car on that day, would have prevented this accident, and that there was no guard or fender there, then you are at liberty to say that the company was careless in omitting to have it. I refer it to the jury to say as a matter of fact whether the absence of a guard contributed in any way to the injury of the plaintiff. I refer that fact to you to determine."

No guard was there or claimed to have been there. Had one been on the platform, likely it would have prevented the accident. Its absence was a fact to be considered, with other facts in the case, in determining what care and vigilance the defendant ought to have exercised. Were the platform so guarded that it would be as safe to ride there as inside, there would be no call for greater care when occupied by passengers. The instruction to the jury was, that if they were of opinion that a fender or guard on the platform would have prevented the accident, they were at liberty to say the company was careless in omitting to have it. If the company was careless by reason of that omission, the omission was negligence, and it was the duty of the company to have placed the guard on the platform. The instruction was the equivalent of saying, as a matter of law, that it was the duty of the company to have the platform guarded by a fender or screen. Unless such was their duty, the

jury were not at liberty to say the company was careless by omitting to have the platform guarded. The absence of gates or screens is as patent to the passenger as to the carrier. Neither the street railway companies nor the public have deemed the platforms so unsafe that a man of ordinary prudence would not ride thereon when the car is full inside. The court will not say, as a matter of law, that it is in itself negligence in the carrier not to place a guard on the platform of a horse car, or in a passenger to stand on the open platform: *Germantown Pass. Ry. v. Walling*, 97 Penn. St. 55.

Judgment reversed and a *venire facias de novo* awarded.

The second point, of the principal case, viz., that it is not contributory negligence *per se* for a passenger to ride upon a platform of a street railway car, is in perfect accord with the prevailing rule, yet there is some apparent conflict in the cases, which it is the purpose of this note to consider.

The rule is universal, that if a plaintiff contributes to his own injury he cannot recover therefor, although the negligence of the other party is extremely great. The law demands that every person shall provide for his own safety. The situation in which he is placed is the criterion by which his responsibility is to be determined. Thus the "reasonable care," which every person is required to exercise, is aptly termed "a varying circumstance": 5 Southern L. Review (N. S.) 843; *North Cent. Rd. v. Price*, 29 Md. 420; *McClung's App.*, 56 Penn. St. 294; *Lynch v. Nurdin*, 1 Q. B. 36.

The degree of care to be exercised by street-car passengers is designated as "ordinary," and what is meant by "ordinary" is sometimes difficult of solution. As it is "a varying circumstance," it is not absolute, but depends upon the existence of the accompanying facts of each particular case: 20 Cent. L. J. 104.

It has been held that the degree of care to be exercised in riding upon a street-car is not so great to make it ordinary as that required in riding upon a railway train drawn by locomotive power: *Meesel v. Lynn & Boston Rd.*, 8 Allen (Mass.) 234; *Gavett v. Manchester &*

Lawrence Rd., 16 Gray (Mass.) 501. See also *Thompson on Car. of Pass.* 444, § 6.

In *Huelsenkamp v. Citizens' Rd.*, 34 Mo. 45, s. c. 37 Mo. 537, the car was full on the inside, on both platforms and on the steps. The party who received the injury, for which the suit was brought, was standing on the bottom, rear step, holding on to the iron railing of the window of the car, with his body leaning out a considerable distance from the car, and when in such situation, in passing another car, stationary upon a short track, commonly called a "turn out," the cars came so near together that his body was crushed between them, which caused his death almost instantly. It was after dark when the injury happened. The cars were not so near together but that one could pass the other without collision. The deceased was warned of his dangerous position by other passengers, and that he had better get off the car or get in further. This was held not to be such negligence as to justify a court in taking the case from the jury. The court, said: "The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited; and the evidence further shows, that owing to the crowded state of the cars, there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employees to have put him off the car; but not having done so, they were bound to carry him with skill,

prudence and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might in all probability have avoided the catastrophe by being on the alert and exercising ordinary vigilance, but such was not required of him."

In *Ginna v. Second Avenue Rd.*, 67 N. Y. 596, it is held that when a street-car is so crowded that one taking passage cannot enter it without unreasonable discomfort to himself and his fellow passengers, and the conductor consents to his riding on the platform and accepts from him the usual fare while there, and such passenger is thrown off and injured through the negligence of the company, the mere fact of his being on the platform does not *per se* constitute contributory negligence, but is a question for the jury.

In *Nolan v. Brooklyn & Newton Rd.*, 87 N. Y. 63, the plaintiff stood upon the front platform smoking, because, as he testified, it was the custom of the line to permit smoking there, but not elsewhere. There were no vacant seats inside. While upon the platform, the conductor took his fare, and the driver suddenly and without warning to any one whipped one of his horses, who plunged under the blows, caused a jar, and threw the plaintiff off the car. The driver attempted to stop the car, but the brake-chain being out of order, he failed, and the plaintiff was run over and injured. The question of the plaintiff's contributory negligence was submitted to the jury. The company had a rule posted on its cars, forbidding passengers from getting on and off the cars while in motion, "or on or off the platform." It was held that this did not relieve the company from responsibility. The court said: "This rule does not forbid riding on the front platform. It is the getting on or getting off from that part of the car which is forbidden; evidently because a misstep or an accidental fall would there be more dangerous than at the rear platform. But once on not a word of

warning is uttered against remaining and riding there."

In *Germantown Pass. Ry. v. Walling*, 97 Penn. St. 55; s. c. 2 Am. & Eng. Railroad Cases 20; the deceased hailed a crowded passenger car, and the driver stopped. He first went to the rear platform but could not get on by reason of the crowd; he then went to the front platform which was also crowded, but succeeded in getting on the step, on which there were already two persons. In turning a curve, several passengers pushed against the deceased which caused him to break his hold from the hand rails, and he fell under the car and was killed. The court, in affirming the judgment of the lower court, held that the question whether the deceased was guilty of contributory negligence, was properly submitted to the jury. In this case the court said: "Street-car companies have all along considered their platforms a place of safety, and so have the public; shall a court say that riding on a platform is so dangerous, that one who pays for standing there can recover nothing for an injury arising from the company's default? * * * Standing on the front platform of the horse-car when there is room inside, is not conclusive evidence that the person injured by the driver's default was not exercising due care: *Maguire v. Middlesex Rd.*, 115 Mass. 239. A street car company has the right to carry passengers on the platforms, and if a passenger be injured while standing there without objection of the company's agent, whether the injury was with his contributory negligence is for the jury to decide, under all the facts and circumstances detailed in evidence."

In *Hadencamp v. Second Avenue Rd.*, 1 Sweeney (N. Y. Superior Ct.) 490, the plaintiff was received as a passenger and his fare taken, there being no room inside, he was permitted to remain on the front platform, and while there he was injured. It was held that he was not guilty of contributory negligence.

In *Meessel v. Lynn & Boston Rd.*, 8 Allen (Mass.) 234, the court said: "It is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, stops the car by means of his voice, his reins and his brake. In turning round an angle, from one street to another, passengers are not required to expect that he will drive at a rapid rate, but on the contrary, might reasonably expect a careful driver to slacken his speed. The seats on the inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them, even after there is no place to stand, except on the steps of the platforms. Neither the officers of the corporations, nor the managers of the cars, nor the travelling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger." See further *Thirteenth & Fifteenth St. Pass. Rd. v. Boudrou*, 92 Penn. St. 475; s. c. 37 Am. Rep. 707, with note; *Sheridan v. Brooklyn & N. Rd.*, 36 N. Y. 39; *Clark v. Eighth Av. Rd.*, Id. 135; s. c. 32 Barb. 657; *Augusta & Summerville Rd. v. Reng*, 55 Ga. 126.

A number of cases have held that where a passenger rides upon the platform without absolute necessity, as where the seats are all taken, but there is standing room within the car, it is not contributory negligence *per se*, but is a question for the jury. Such position may be a condition without being a cause of the injury, as where a passenger riding on the rear platform is struck by the pole of the following car, as in *Thirteenth & Fifteenth Pass. Rd. v. Boudrou*, 92 Penn. St. 475; s. c. 37 Am. Rep. 710.

In *Burns v. Bellefontaine Rd. of St. Louis*, 50 Mo. 139, the plaintiff stood upon the front platform when there was

room inside. This was held not to be negligence in itself. The court said the company had a right to carry passengers there, and if a passenger was injured while standing there without objection by the company's servants, whether it was with his contributory negligence is for the jury to decide. See *Thompson on Car. of Pass.*, p. 441, where this case is reported in full.

But *Andrews v. Rd.*, 2 Mackey (S. C. Dist. Columbia) 137; s. c. 15 Reporter 330, seems to be in conflict with the last case. Here the plaintiff entered the car from the rear, to put his fare in the box, the car being what is known as a "bob-tail." He remained on the platform for some time; the seats were all taken, but there was ample standing room inside, and straps pendent from the roof for passengers to hold by. He had one foot on the platform and the other in the door of the car, when, on turning a corner, the car "produced a jar," and he was thrown off and seriously injured. This was held *per se* negligence. But this ruling cannot be considered sound law.

A passenger may ride in such a manner upon the platform, so that he will be chargeable with contributory negligence. Thus, in the recent case of *Downey v. Hendrie*, 46 Mich. 498, the plaintiff was sitting on the driving bar of the front platform of the car, by the invitation of the driver, from which position he fell and was injured. There was ample room within the car, both standing and seating. It was contended that as the plaintiff was invited to ride on the front platform by the defendant's servant, therefore the company was estopped from setting up the plaintiff's situation as contributory negligence.

While this was acknowledged to be a rule of law by the court, it was said, "the rule is plainly not one of universal application. Regard must be had to the passenger's capacity to look out for himself; the opportunity there may be to get

a safer position; to the distinctness, certainty and extent, or degree of the peril, and so on." "May the ordinary person," said the court, "with his eyes open and with abundant accommodations before him, which are safe, accept an invitation from the carrier to ride on the cow-catcher, and then, if injury arises from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and in substance to stultify himself in order to cast a liability on another." Judges cannot denude themselves of the knowledge of the incidents of railway traveling, which is common to us all." *Lake Shore & Mich. Rd. v. Miller*, 25 Mich. 274; *Siner v. Great Western Rd., L. R.*, 4 Ex. 123; *Dublin, Wicklow & Wexford Rd. v. Slattery*, 3 App. Cases 1155; s. c. 10 Ir. Rep. 256; 24 Eng. 713.

If the passenger sits on the steps of the front platform, against the warning of the conductor, without making an

effort to secure himself by holding on to the railing, he will be deemed guilty of contributory negligence, and cannot recover, if injured: *Wills v. Lynn & Boston Rd.*, 129 Mass. 351.

In *Ward v. Central Park Rd.*, 33 N. Y. 392; s. c. 11 Abb. Prac. Rep. (N. S.) 411; s. c. 42 How. Pr. 289, the plaintiff was standing on the edge of the rear platform of the defendant's car, and was thrown off and injured. He made no effort to hold on. He was not permitted to recover.

The recent case of *Heckrott v. Buffalo St. Rd.*, Superior Ct. Buffalo, 13 Am. Law Record 295, is interesting, and contains a thorough review of the cases. Here the plaintiff took passage on the defendants' car, he standing on the front platform, with his foot on the iron rod near the dash-rail, and his back against the window, from which position he fell off the car and was injured. In an action against the company it was held that he could not recover, as his situation was the proximate cause of the injury.

B. E. BLACK.

San Jose, Cal.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.¹

COURT OF ERRORS AND APPEALS OF MARYLAND.²

SUPREME COURT OF NEW JERSEY.³

SUPREME COURT OF VERMONT.⁴

SUPREME COURT OF WISCONSIN.⁵

ACTION. See *Husband and Wife*.

AGENT. See *Insurance*.

Illegal Transaction—Estoppel.—An agent who receives money for his principal upon a contract not criminal or immoral in its character, but

¹ From Hon. N. L. Freeman, Reporter; to appear in 113 Ill. Rep.

² From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

³ From G. D. W. Vroom, Esq., Reporter; to appear in 18 Vroom.

⁴ From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

⁵ From F. K. Conover, Esq., Rep.; will probably appear in 63 or 64 Wis. Rep.

contrary to public policy only, will be estopped from setting up the supposed illegality of such contract in defence to an action by his principal to recover the money in his hands: *Taylor v. Pells*, 113 Ill.

In this case a person, as the agent of a firm of contractors for the construction of a railroad, procured subscriptions for the purpose of securing the location of a depot at a certain point on the road, in which those who made the subscriptions were interested, the contractors having the power, under the terms of their arrangement with the railroad company, to fix the location of the depot at the place desired. The agent who thus procured the subscriptions was at the time a director in the railroad company, and, having applied the proceeds of the subscriptions to his own use, in a suit by his principals to recover from him the money so obtained, he set up the supposed illegality of the contract resulting from his official relation to the railroad company, as a defence; but it was *held*, he was estopped from relying upon such defence as against his principals: *Id.*

ASSIGNMENT. See *Attachment*.

Tort—Right of Assignee to Sue.—A cause of action for the obstruction of a navigable river was assigned absolutely in consideration of the assignee applying the net proceeds of the claim to the payment of certain debts of the assignors and paying any overplus to such assignors: *Held*, that the assignee might maintain the action in his own name: *Gates v. Northern Pacific Railroad*, 63 or 64 Wis.

ATTACHMENT.

Effect of—Assignment intervening between two Attachments.—After a debtor to a defendant in attachment had been garnished by a creditor of the defendant, the latter transferred and assigned his claim or demand to another creditor, and notice of the transfer was given to the debtor, when a second creditor in attachment against the same defendant garnished the same debtor, and both suits proceeded to judgment at the same term. The funds in the hands of the garnishee were not sufficient to satisfy the two judgments, and the court ordered the same to be apportioned between the two judgment creditors to the exclusion of the assignee of the debt owing by the garnishee: *Held*, that the court decided in accordance with the law: *Reeve v. Smith*, 113 Ill.

A chose in action is not assignable, either at common law or under our statute, so as to vest the legal title in the assignee. Such assignee will take the same subject to all defences that existed against the assignor. He stands in the shoes of his assignor, and can claim no greater rights in the demand assigned than could his assignor: *Id.*

ATTORNEY.

Privileged Communications.—Where two parties go together to an attorney, and make statements to him in the presence of each other, such statements are not confidential communications intended to be withheld from the opposite party, and there is no error in permitting the attorney to testify thereto in a suit between the parties relating to the subject-matter of such communications: *Lynn v. Lysterle*, 113 Ill.

BAILMENT.

Shipment of Goods without Order—Delivery to Carrier—Consignor and

Consignee—Lien of Factor—Assumpsit—Trover—Measure of Damages.—Where goods have been shipped to one who has not ordered them, title does not pass to the consignee by delivery to the carrier, and the right to change the consignment and destination during the transportation remains in the shipper: *Ruhl v. Corner*, 63 Md.

If the factor have claims for advances against his principal, and it be expressly agreed that goods shall be shipped to the factor to pay those advances, the law makes the delivery to the carrier a delivery to the consignee, though a factor. But such is not the case where there is no agreement or mutual assent on the part of the consignor and consignee to that effect at the time of the shipment of the goods: *Id.*

If the factor receives a consignment of goods for sale, while the goods are still the property of the consignor, the lien of the factor for previous advances to the consignor will at once attach, and the consignor will have to pay the advances in order to release the goods: *Id.*

But if while the goods are *in transitu* and at his risk, the consignor parts with the title, the goods are no longer his, and the lien of his factor will not attach, although the goods actually come into his possession: *Id.*

C. was a commission merchant in Baltimore, to whom M. in Minnesota had, prior to the month of January 1882, made consignments of flour for sale upon commission. On the 21st of January 1882, M., without any order from C., consigned to him a car load of flour for sale. No bill of lading was sent to C.; but M. advised him of the shipment by letter, and named a price at which he should sell. At the time of the shipment, M. was indebted to C. on account of advances made upon previous shipments, but it did not appear that he knew, or that C. had informed him of the state of the accounts between them. While the goods were in transit, M. sold the flour to R. in Baltimore, and had the bill of lading made out in R.'s name, and gave the carriers the necessary instructions for having the flour delivered to R., at Baltimore, instead of to C. Through a failure to carry out these instructions, the flour was delivered to C., by whom it was sold. In an action of assumpsit brought by R. against C., it was *held*: 1st. That the property in the flour had vested in R., who was entitled to maintain the action. 2d. That R. having sued in assumpsit, and not in trover, he was only entitled to recover for the money received from the sale of the flour: *Id.*

COMMON CARRIER. See *Negligence*.

Railroad—Passenger riding in dangerous place—Contributory Negligence.—Plaintiff's intestate, who, in pursuance of a contract for the carriage of horses, and in accordance with the custom in such cases, was riding in the same car with the horses in order to care for them, was killed in a collision caused by defendant's gross negligence. *Held*, that he would not, as an ordinary passenger who had voluntarily placed himself in a dangerous position, be deemed to have been guilty of contributory negligence: *Lawson v. C., St. P., M. & O. Ry. Co.*, 63 or 64 Wis.

Where it is customary for some person to ride in the same car with horses, to care for them, it would seem to be within the general authority of the conductor of the train to grant permission to a person so to ride for that purpose: *Id.*

CONSTITUTIONAL LAW.

Impairing Obligation of Contract—Charter of Corporation—Alteration of Proceedings as to Land Damages.—The rule that the legislature does not impair the obligation of a contract by limiting or altering the modes of proceeding for enforcing it, provided the remedy be not withheld or embarrassed with conditions or restrictions which impair the value of the right, applies as well to irrevocable charters as to contracts between individuals: *State v. Weldon*, 18 Vroom.

The charter of a railroad company, which was irrevocable, gave the company the power to take lands by condemnation, and provided for an appeal by the land-owner, from the award of damages, to a certain court: *Hell*, that a general statute which took away the right to appeal to that court, and gave an appeal to another court on the same terms and conditions, and with the same mode of trial, was not unconstitutional: *Id.*

CRIMINAL LAW.

Gambling—Pool Selling.—The selling of pools on horse-races, and the keeping of rooms where such pools are sold, do not constitute an offence within the meaning of a statute which prohibits the keeping of a gaming table or other place of gambling, and which declares that all games, devices and contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming-table: *James v. State*, 63 Md.

Evidence—Competency of an Accused Party to Testify as to his Intent.—A person on trial for an assault with intent to murder, is competent to testify as to the purpose for which he procured the instrument with which he committed the assault: *Fenwick v. State*, 63 Md.

Larceny—What Constitutes at Common Law—Possession of Goods.—

At the common law there are three cases in which a conviction for larceny may be sustained when the apparent possession is in the accused: First, where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like: second, where he obtains the custody and apparent possession by means of fraud, or with the present purpose to steal the property; and third, where one has acquired possession by a valid contract of bailment, which is afterward terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, with the former, and he feloniously converts the property to his own use: *Johnson v. The People*, 113 Ill.

Larceny at the common law is defined to be "the felonious taking and carrying away of the personal goods or property of another." Every larceny at common law includes a trespass to personal property, and no one lawfully in the possession of goods can commit a larceny of them at common law: *Id.*

Goods on the premises of the owner, to be used by himself and family including his servants, are always deemed to be in the possession of the owner, although the ordinary duties of the servants and other members of the household require them, from time to time, to handle, occupy or use them, or even to sell or dispose of them. So where chairs, beds, &c., are occupied by a guest, whether in a hotel or private family, or where plates or other articles are used by one at the table of another, or where the owner delivers a chattel to another to be examined or used for some temporary purpose in the presence of the owner, the same rule

applies. In all such cases the possession remains with the owner, and those having the temporary use or occupancy are deemed to have only the mere custody, and a felonious taking of the same by them is larceny: *Id.*

But when the owner of a chattel delivers it to one, other than a mere servant, in trust, upon a contract that the latter will faithfully execute the trust, the rule is different. In such case, which is an ordinary bailment, the possession as well as the custody passes to the bailee with its delivery, and while the bailment exists the bailee cannot, by the common law, commit a larceny of the chattels: *Id.*

Where the possession is not fairly and honestly obtained, as when there is an original purpose on the part of the bailee to steal the property, and the bailment is a mere pretence on his part to hide a felonious intent, the possession will not pass; and if the property is subsequently converted in pursuance of such criminal purpose, it will be larceny, by the common law: *Id.*

Where the owner intends to part both with the title and possession, and the property is delivered in pursuance of such intention, the person receiving it cannot be convicted of larceny, although the transfer was induced by the fraud of the latter, and with a purpose to steal the property: *Id.*

Evidence—Bastardy—Exhibition of Child in Court.—In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child: *Hanawalt v. State*, 63 or 64 Wis.

Assault and Battery—Evidence—Participation.—Where the assault and battery complained of were part of one preconcerted affray, evidence of the circumstances of other fights engaged in by the defendants in the execution of their unlawful purpose, is admissible: *Rhinehart v. Whitehead*, 63 or 64 Wis.

A person who goes to a place with others with the intent to get up a fight with persons there, may be liable for an assault and battery committed in the execution of that purpose, although he did not actually participate in such assault: *Id.*

DAMAGES. See *Bailment*; *Negligence*; *Pleading*.

Death—Statutory Action by Next of Kin—Nature and Measure of Damages.—Damages recoverable for the death of any person are limited by the statute to such as arise from pecuniary injury, resulting from the death, to the widow and next of kin: *Demarest v. Little*, 18 Vroom.

Injury received by some of the next of kin, by the dissolution of a partnership relation between them and deceased, is not within the scope of the statute: *Id.*

Injury claimed to arise by the deprivation of such services and counsel as a father might probably give to his children, must be limited to such services and counsel as would be of pecuniary advantage, and must be determined with careful reference to the age, condition and relations of the parties: *Id.*

Where the injury claimed is the deprivation of the probability of receiving such probable accumulations as deceased might have made if he had continued in life, income derivable from funds invested, and

which the next of kin have received, should not be taken into account, and due weight must be given to contingencies which might diminish the probable accumulations or divert them from the next of kin : *Id.*

DEBTOR AND CREDITOR. See *Execution ; Sale.*

DEED.

Construction.—B., being the owner in fee of a tract of land, conveyed to his mother an undivided third part of it during her widowhood. Subsequently B. and his wife conveyed the same land to W. by a deed, the granting clause of which states that the grantors did thereby convey "unto the said J. W., his heirs and assigns, all their estate, right, title and interest, trust property or claim and demand whatsoever at law or in equity of them, the said S. A. B., and N., his wife, of, in and to, the following described parts of tracts or parcels of land. * * * It is understood by the parties herein mentioned, that the interest herein conveyed is the two-thirds of the above described land :"*Held*, that this deed only conveyed to W. a two-thirds interest in the land described : *Zittle v. Weller*, 63 Md.

The rule which requires a deed to be construed most strongly against the grantor, is to be resorted to and relied on only when all other rules of exposition fail to reach with reasonable certainty the intention of the parties : *Id.*

The rule that where there are two contradictory or repugnant clauses in a deed the first clause shall prevail over the latter, has no application to a case where the supposed contradiction is between parts of the same clause : *Id.*

DEVISE.

Catholic Bishop—Religious Corporation—Equitable Conversion.—A. devised unto B., a Catholic bishop, in his individual capacity, all the real and personal property owned by the testator at his death, in trust that upon the request of a certain religious congregation, the trustee would sell the property, either at public or private sale, and apply the proceeds to the erection or maintenance, or both, of an orphan asylum, under the direction of, and as requested by such congregation : *Held*, that this was not a devise of real estate to a religious corporation, but to an individual as a trustee, and is not prohibited by any statute or law of this state : *Germain v. Baltes*, 113 Ill.

Where a testator devised all his real and personal estate to one as a trustee, to be sold and converted into money when so requested by an incorporated religious society, and applied in establishing an orphan asylum, to be under the direction and control of such society, it was *held*, that the devise in favor of the charity was a devise of money and not of land, and was such as the courts will uphold : *Id.*

EVIDENCE. See *Criminal Law.*

Lease—Unsigned Memorandum of Terms—Res gestæ.—In the course of a negotiation for a lease, a paper was partly written by the defendant and handed by him to the plaintiff, and by him interlined and returned to the defendant, which paper was not signed by either of the parties. On the trial the question was whether the terms of the lease were those mentioned in the paper only, or there were other terms agreed

upon outside of it: *Held*, that this paper, although unsigned, was admissible in evidence as part of the *res gestæ*: *Freeman v. Bartlett*, 18 Vroom.

EXECUTION.

Exempt Property—Fraudulent Purchase of by Debtor.—An insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay, or defraud his creditors; but the property so purchased does not, for that reason, cease to be exempt. The only remedy of the creditors is by attacking the sale of the non-exempt property: *Comstock v. Bechtel*, 63 or 64 Wis.

EXECUTORS AND ADMINISTRATORS. See *Husband and Wife*.

EXEMPTION. See *Execution*.

FACTOR. See *Bailment*.

FIXTURES.

What are—Remedy for Removal.—Boards in a corn barn, used for a permanent floor, and stone posts, deposited upon the farm for the purpose and with the intention of building necessary fences, could not lawfully be sold as personalty by an officer on the extent: *Hackett v. Amuden*, 57 Vt.

Trespass *de bonis* is the proper form of action to recover for the boards and posts; as the claim was, not for breaking and entering, but for taking and carrying away: *Id.*

HUSBAND AND WIFE. See *Insurance*.

Action—Promise of Husband to repay Moneys received from Wife—Promise of Executors.—A suit at law will not lie on a promise of a husband to repay to his wife moneys received by him for her during coverture: *Rusling v. Rusling*, 18 Vroom.

But such suit will lie against the executors of the husband on a promise made by them officially to pay the moneys so received by the husband: *Id.*

Feme Covert—Personal Tort—Joinder of Husband and Wife—General Demurrer.—A *feme covert* brought suit for a personal tort, by her next friend. It appeared on the face of the declaration that she had a husband living. On general demurrer to the declaration, it was *held*, 1st. That the suit should have been brought in the names of the husband and wife jointly; 2d. That as the defect appeared upon the face of the declaration, advantage could be taken of it by general demurrer: *Treusch v. Kamke*, 18 Vroom.

LANDLORD AND TENANT. See *Nuisance*.

MORTGAGE.

Chattel Mortgage—Certainty of Description—Chattels to be consumed for Benefit of Mortgagee.—The description of property in a chattel mortgage as "Forty-one Berkshire hogs and sixty-five grain sacks," is not so uncertain as to invalidate the mortgage: *Knapp v. Deitz*, 63 or 64 Wis.

A mortgage of chattels furnished by the mortgagee to the mortgagor and to be used and consumed by him for the benefit of the mortgagee, is not void as to the creditors of the mortgagor: *Id.*

Animals—Increase—Bona Fide Purchaser.—Where domestic animals are mortgaged during the period of gestation, the offspring when born will, as between the parties to the mortgage, be covered thereby; but as against a *bona fide* purchaser or encumbrancer acquiring his title or lien without notice of the facts and after the period of nurture has passed, such offspring will not be covered by the mortgage: *Funk v. Paul*, 63 or 64 Wis.

One who takes a mortgage of chattels to secure a pre-existing debt which is not yet due, and without any new consideration, is not entitled to protection as a *bona fide* purchaser or encumbrancer: *Id.*

Improper Filing—Rights of Mortgagee to Insurance Money as against Attachments.—A mortgagee of chattels which are insured by a policy providing that the loss shall be payable to him as his interest may appear, is entitled to the insurance money to the amount of the mortgage debt, as against creditors of the mortgagor garnishing the insurance company after a loss, although the mortgage was not properly filed: *Marson v. Phoenix Ins. Co.*, 63 or 64 Wis.

MUNICIPAL CORPORATION.

Council—Seating of Member—Conclusiveness of First Investigation.—The common council of a city, made by the charter the sole judge of the election and qualifications of its own members, having once investigated and seated a member, cannot, at a subsequent meeting, order a second investigation: *State v. City Council of Camden*, 18 Vroom.

NEGLIGENCE. See *Common Carrier*.

Opening in Sidewalk—Contributory Negligence—Damages—Evidence.—For an injury resulting from a fall into an opening in the sidewalk of a public street, communicating with a cellar of the adjoining building, and left without guard or notice of danger, the owner and occupier of the premises is liable: *Houston v. Traphagen*, 18 Vroom.

Whether the injured person contributed to the injury by his negligence depends on the circumstances; and where it appeared that he stepped into the unguarded opening while his attention was attracted by objects in a shop window above the opening, the plaintiff should not be nonsuited, and a verdict in his favor should not be disturbed: *Id.*

When it is claimed that the fall produced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause: *Id.*

Ferry-boat—Passing Ashore in Crowd.—A person who, in passing from a ferry-boat to the dock, puts himself in so dense a crowd that he cannot see to his footing, and in that situation gets his foot crushed between the boat and the dock, has no cause of action against the ferry company, as his own negligence has been contributory to the injury: *Dwyer v. N. Y., L. E. & W. Ry. Co.*, 18 Vroom.

NUISANCE.

Liability of Landlord—Stipulation of Tenant to Repair.—He who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the nuisance is: *Ingwersen v. Rankin*, 18 Vroom.

Such liability will exist although the tenant by his demise stipulates to keep the premises in repair: *Id.*

A landlord whose tenant during the term has created a nuisance on the demised premises will not be liable therefor so long as he has no right of entry or power to abate; but when the term expires, or the landlord may enter and abate the nuisance, he will become liable for its continuance, and that liability cannot be evaded by a renewal of the lease, though with covenants to repair and without the landlord's having taken actual possession: *Id.*

Quære. Whether knowledge of the existence of the nuisance is necessary to establish the landlord's liability in such cases: *Id.*

PARENT AND CHILD.

Support of Child—Allowance out of his Estate.—The parents of an infant child lived apart, and the mother supported it both before and after lands were devised to it. Upon the death of the child the parents became its sole heirs: *Held*, that in equity the mother was entitled to an allowance out of the child's estate for the amount expended by her upon its support. *TAYLOR, J.*, dissents: *Pierce v. Pierce*, 63 or 64 Wis.

PARTNERSHIP.

Agency—Execution by one Partner of Sealed Instrument.—A partner cannot bind his copartner by warrant of attorney under his hand and seal in the name of the firm where there has been no previous consent or authority given or subsequent ratification: *Ellis v. Ellis*, 18 Vroom.

PAYMENT. See Usury.

PLEADING.

Action for Tort—Damages.—In an action for a personal tort, the amount of the damages claimed must be laid in the declaration; and if no damages are laid the defect will be fatal on general demurrer: *Treusch v. Kamke*, 63 Md.

The amount of the damages claimed in such case is a jurisdictional fact. If the amount exceed \$100, the Court of Common Pleas has jurisdiction, if it be less than \$100, a justice of the peace has exclusive jurisdiction: *Id.*

RAILROAD. See Common Carrier.

SALE.

Change of Possession—Exception to Rule—Fraud in Law.—A sale of saw logs piled on land so low and wet that it was impossible to remove them, only on frozen ground, without the cost exceeding the value of the logs, is valid against attaching creditors, without a change of possession: *Kingsley v. White*, 57 Vt.

But, if a change of possession had been necessary, it was *held*, that

the facts, that the vendor had sold and conveyed the lot to a third party by a deed with only one witness to it, that such third party, the vendor and the purchaser, with his attorney, went on to the lot, and marked the logs with the purchaser's initials, the third party agreeing to take care of them for him, did not constitute a sufficient change of possession, as it was not found—and the court could not infer it—that the third party was in open, visible possession of the lot: *Id.*

SET-OFF.

Judgments—Decree in Admiralty.—A decree in admiralty in favor of a libellant, on a libel for damages in a federal court, may be set off against a judgment recovered in this court against the libellant, the parties in the two suits being the same: *Schautz v. Kearney*, 18 Vroom.

STREET. See *Negligence*.

SUBROGATION.

Joint Sureties—Separate Bonds—Different Conditions.—The rule that if one of two joint sureties for an insolvent principal holds collateral the other is entitled to share in it, does not apply where the sureties are on separate bonds to secure a faithful discharge of duty on the part of the principal acting in different capacities, first as guardian of an insane ward, and then on the ward's death, as administrator of her estate, when the collateral was not given as security for signing the bond, but for signing as surety certain bank notes; and this is so, although, after it was claimed that the principal was in default, the sureties entered into a written agreement to join in defence and share equally in the liability; and the defendant realized more out of the collateral than he was compelled to pay on said notes: *Somers v. Johnson*, 57 Vt.

SURETY. See *Subrogation*.

Surrender of Security offered in lieu of Note.—The orators were sureties on a note, and the defendant the payee. The principal attempted to induce the payee to accept his own note secured by a mortgage on a lot of land owned by him in lieu of his note with said sureties; and the payee took the mortgage into his possession, and agreed to exchange, if on examination he should find the title clear of encumbrance. On being informed by the town clerk that there was an undischarged mortgage on the land he refused to exchange, and returned the mortgage to the principal, although the surety requested him to hold it. It turned out afterwards, that the land was clear. A bill having been brought to restrain the payee from collecting the note; *held*, that the rule, that the voluntary surrender by a creditor of security pledged by the principal for the debt discharges the surety, does not apply, and that the bill should be dismissed: *Adams v. Dutton*, 57 Vt.

TRIAL.

Notes of Evidence—Variance—Question for Jury—Testimony of Attorney.—When an official reporter is not present at a trial to take down the exact words—the court having made no minutes—and counsel disagree as to what a witness said on a matter material to the issue, it is

not only proper for the court to submit the question to the jury, but it is his duty to do so; and this is so, although the defendant moved for a nonsuit on the ground of variance: *Porter v. Platt*, 57 Vt.

In such a case, the testimony of an attorney with his minutes taken on trial, is not admissible to strengthen or weaken that of a witness given on the same trial: *Id.*

TROVER.

Property obtained by Fraud.—The title to property does not pass when possession is obtained by fraud; thus, the defendant falsely representing himself to be one of a firm of produce commission merchants in Boston, induced the plaintiff to send poultry to said firm to be sold on commission, with the fraudulent purpose of obtaining it without paying for it: *Held*, that the property did not pass, and that trover would lie for the conversion: *McCrillis v. Allen*, 57 Vt.

USURY.

Mortgages—Relief in Equity—Application of Payments.—The P. L. Co. held three mortgages made by D. of different dates. Usurious interest was paid on the two elder mortgages, and they were overpaid, the aggregate payments exceeding the amount of the principal with legal interest thereon. More than three years after the last payments made thereon, D. filed a bill for the redemption of all three mortgages, and for an account, and asked that the amount overpaid on the first two mortgages by reason of the usurious interest exacted, should be applied in reduction of the sum due on the third mortgage. On limitations pleaded in bar of the right to an account, it was *held*, that it being conceded that there had been an application of payments already made by agreement of the parties to the first two mortgages, those payments could not by mere operation of law be afterwards transferred to the subsequent debt created by the last mortgage: *Dickey v. Permanent Land Co.*, 63 Md.

The rule in regard to the application of payments is well defined. At the time when payment is made, there may be an application by agreement between the debtor and creditor. If there be no such agreement the debtor may make the application; and in the absence of any action on his part, the creditor may apply the money to the extinguishment of any claim which he has against the debtor. If there has been no application by parties, the law will apply the payment in conformity with established and recognised rules: *Id.*

But the law never makes an application of payment when the parties have already done so. And this rule governs even in the case of an application of money to the payment of an item in an account current which is not recoverable in an action: *Id.*

VESSEL.

Joint Owners—Conversion.—One joint owner of a vessel cannot maintain an action against his co-owner for a conversion thereof, except in case of a total destruction, or something equivalent thereto, through the fault of such co-owner. The fact that the co-owner has negligently damaged the vessel, or has run it into debt and created liens upon it beyond its value, is not sufficient: *Alderson v. Schulze*, 63 or 64 Wis.

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ASSIGNMENTS OF LIFE INSURANCE POLICIES.

POLICIES of life insurance are assignable equally with other choses in action, and derive much of their utility and value from such element of assignability: *Olmsted v. Keyes*, 85 N. Y. 593; *St. John v. Am. Mut. Life Ins. Co.*, 13 Id. 3, 31. Such policy is a writing obligatory for the payment of a certain sum of money at a future time, with a right of action against the company issuing the same upon the happening of the contingency upon which such payment depends: *Chapman v. McIlwraith*, 77 Mo. 38; *Mut. Life Ins. Co. v. Allen*, 138 Mass. 24. As a non-negotiable chose in action, an assignee thereof can acquire no greater rights than his assignor had: *Gilbert v. Moose*, 104 Penn. St. 72; and is subject to all equities existing at the time of transfer, and all defences valid as between the original parties: *Harley v. Heist*, 86 Ind. 196. Nor can an assignee acquire any greater rights than are given by the instrument itself: *Diffenbach v. Vogeler*, 61 Md. 370; and the general words of an assignment are restricted by the particular words of the policy itself: *Armstrong v. Ins. Co.*, 20 Blatchf. 493.

It is also true, however, that such assignment carries with it every incident or accessory essential to the use or enforcement of the policy transferred, or that will conduce to the attainment of the end and purpose in view of the parties to the assignment: *Hollis v. Ins. Co.*, 12 Phila. 321. And, by reason of the affirmative acts, omissions or neglects of the owner or assignor of a policy, a *bona*

fide assignee thereof for value, without notice, may acquire, under the rules of equitable estoppel, a good title against all the world: *Norwood v. Guerdon*, 60 Ill. 253; *Wells v. Archer*, 10 S. & R. 412; *Damron v. Penn Mut. Life Ins. Co.*, 99 Ind. 479; *Ætna Life Ins. Co. v. France*, 94 U. S. 561; *Hall v. Dorchester*, 111 Mass. 53; *Gale v. Lewis*, 9 Q. B. 742.

Life insurance policies are assignable by parol and mere delivery: *West v. Carolina Ins. Co.*, 31 Ark. 476; *Soule v. Union Bank*, 45 Barb. 111; *Malone's Estate*, 8 W. N. C. 179; *Chapman v. McIlwraith*, 77 Mo. 28; *Stout v. Yeager Co.*, 13 T. R. 802; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625; *Griffey v. Ins. Co.*, 30 Hun 299; *Ins. Co. v. Kelly*, 32 Md. 421; *Hudson v. Merrifield*, 57 Ind. 24; *Moore v. Woolsey*, 4 E. & B. 243; *Jones v. Consolidated Ins. Co.*, 2 Beav. 256; *Durfaur v. Professional Ins. Co.*, 25 Id. 603; *Hart v. Forbes*, 60 Miss. 745; *Williams's Appeal*, 10 Out. 116. Possession of a policy is *prima facie* evidence of title, and of the right to demand and receive of the insurance company the money due thereon at the time when by its terms it is contracted to be paid: *Page v. Burnstine*, 102 U. S. 664; *Armstrong v. Ins. Co.*, 20 Blatchf. 493; *Collins v. Dawley*, 4 Col. 138. Lord MANSFIELD says, "it gives a lien at law:" *Godin v. L. Assur. Co.*, 1 Burr. 489. Any act on the part of the owner of an insurance policy showing not only a present intention to transfer, but that he regards himself as having carried that transfer into effect, is sufficient to constitute an assignment: *Swift v. Ry. Conductors' Mut. Ass'n*, 96 Ill. 309; *Chowne v. Baylis*, 31 Beav. 351; *Malone's Estate*, *supra*; *Wood v. Phœnix Ins. Co.*, 22 La. Ann. 617. An equitable title to policies can be acquired without any formal writing, such being the mutual intentions of the parties: *St. John v. Am. Life Ins. Co.*, 13 N. Y. 31; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 Id. 625; *Malone's Estate*, 8 W. N. C. 179; *Cook v. Black*, 1 Hare 390. The assignability of policies is generally declared by the terms thereof: *Pomercy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Mutual Protection Ins. Co. v. Hamilton*, 5 Sneed 269. They are usually made payable to the beneficiary "or assigns." The policy, when made so payable, is generally rendered more available as security by indorsement as well as delivery: *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; *Merrifield v. Baker*, 11 Allen 43; *Collins v. Dawley*, 4 Col. 138; *Durfaur v. Ins. Co.*, 25 Beav. 599. But a policy is assignable

although not made payable "to assign :'' *Archibald v. Mut. Life Ins. Co.*, 38 Wis. 542 ; *DeRonge v. Elliott*, 23 N. J. Eq. 486. An indorsement in blank is sufficient to pass the title, as by such indorsement is implied an express or implied authority from the party signing to the person to whom it is delivered to fill up the blanks in accordance with the intentions of the parties ; for where a party has power to do a thing, and means to do it, the instrument he employs is to be construed so as to give effect to his intention : *Norwood v. Guerdon*, 60 Ill. 253 ; *Fowler v. Butterly*, 78 N. Y. 68 ; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294 ; *Bond v. Bunting*, 78 Penn. St. 213. Otherwise, where such blank assignment is obtained by coercion : *Whitridge v. Barry*, 42 Md. 140. An assignee of the insurance policies, requiring indorsement as well as delivery to perfect the legal title, and deposited as collateral upon an agreement to execute such indorsement, the assignor dying before complying with such agreement, will be aided in equity by a decree against the company for the payment of the amount due on the policy, with interest, without a formal assignment : *Curtius v. Caledonian Ins. Co.*, L. R., 19 Ch. Div. 534 ; *Crossley v. Glasgow Life Ins. Co.*, 4 Id. 421 ; *Webster v. British Empire Life Ins. Co.*, 15 Id. 169. No title, however, can be acquired to policies although assigned by endorsement and delivery by both husband and wife, where made payable to a wife or to wife and children, or to minor children, in jurisdictions where such assignments are prohibited by statute, or held to be against public policy : *Chapin v. Fellowes*, 36 Conn. 132 ; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157 ; *Borroughs v. State Mut. Life Ins. Co.*, 97 Id. 359 ; *Mutual Life Ins. Co. v. Applegate*, 7 Ohio St. 292 ; *Bond v. Ins. Co.*, 9 Phila. 149 ; affirmed 78 Penn. St. 213 ; *Turner v. Quincy Ins. Co.*, 109 Mass. 573 ; *Ricker v. Oak Life Ins. Co.*, 27 Minn. 193 ; *Pence v. Makepeace*, 65 Ind. 345 ; *Glanz v. Gloeckler*, 104 Ill. 573 ; *Mallory v. Travellers' Ins. Co.*, 38 N. Y. 294 ; *Stokell v. Kimball*, 59 N. H. 13.

Delivery of the policy is essential to the validity of an assignment. It may be by some act or conduct, which at law or in equity will be regarded as a substantial compliance with the rule ; *Fowler v. Butherby*, 78 N. Y. 68 ; *Conard v. Ins. Co.*, 1 Pet. 449 ; *Lemon v. Phoenix Ins. Co.*, 38 Conn. 294 ; *Pence v. Makepeace*, 65 Ind. 345 ; *Wood v. Phoenix Life Ins. Co.*, 22 La. Ann. 617. So notice to the company of an assignment without possession, will sustain

an assignment; *Palmer v. Merrill*, 6 Cush. 282; *Chowne v. Baylis*, 31 Beav. 35. The rule was applied to a creditor, who promised an insurance policy as collateral, failed by negligence to obtain it before the death of his debtor: *Suc. of De Meza*, 26 La. Ann. 35. And a prior assignee with possession is preferred in equity: *Diffenbach v. Vogeler*, 61 Md. 370; *Spencer v. Clarke*, L. R., 9 Ch. Div. 137. But where a policy was deposited as security, without notice to the company, and the insured, by false representations, obtained a duplicate copy and assigned it by deed to his wife, it was held that if the wife took the assignment without notice of the fraud, she had a legal right and equity superior to that of the first assignee: *Le Feuvre v. Sullivan*, 10 Moore's Pr. C. C. 1; *Spencer v. Clarke*, L. R., 9 Ch. Div. 137. Consent of the assignee, however, to the assignment, is requisite to its validity, where delivered to a third party not an agent of the assignee for any purpose: *Hart v. Forbes*, 60 Miss. 745; *Suc. of Richardson*, 14 La. Ann. 1. Policies delivered to an assignee as security for advances less in amount than the value of the policies, may be assigned for other loans upon notice to the first assignee, and such assignment is sustained as an equitable appropriation of any surplus to the benefit of the second or later assignee: *Marts v. Ins. Co.*, 44 N. J. L. 478; *Diffenbach v. Vogeler*, 61 Md. 370; *City Bank v. Ass. Co.*, 32 W. R. 658; *Myers v. Guarantee Co.*, 7 DeG., M. & S. 112. Assignments of part interests in policies are sustained as vesting an equitable right therein: *Palmer v. Merrill*, 6 Cush. 282; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398; especially if the company consents: *Woods v. Rutland Mut. Fire Ins. Co.*, 31 Vt. 552. It was doubted, however, whether an assignment, *qua* assignment, was sufficient to pass the title where a policy had been made payable to the person upon whose life it was taken out, and upon delivery of the policy, at his request, the agent of the company immediately made an assignment thereof to a third party, a copy of which was sent to the general office, but none to the assignee, and no notice was ever given to him, the assignor retaining the policy and paying the premiums until the day of his death: *Scott v. Dickson*, 16 W. N. C. 181. But, in a like case, where a policy was made payable to B., but was retained and the premiums paid by A., B. being ignorant of the transaction, and A. afterwards sought to change the policy so as to make it payable to himself, but the company refused without the consent of B., the court held that it had no power to

compel B. to assign the policy; *Potter v. Spilman*, 117 Mass. 322.

The Title of the Assignee.—The assignment of an insurance policy as collateral security upon a valuable consideration, vests in the assignee the legal title to the securities, and entitles him to enforce the same, holding any surplus after payment of the loans, interest, premiums and assessments paid, for the benefit of the parties equitably entitled to the same: *Harrison v. McConkey*, 1 Md. Ch. Dec. 34; *Scobey v. Waters*, 10 Lea 555; *Gilman v. Curtis*, 14 Ins. Law J. 15; *Armstrong v. Ins. Co.*, 20 Blatchf. 493; *McCord v. Noyes*, 3 Bradf. 139. The assignor, retaining only an equitable interest in the securities, while he may be a proper party to a suit to enforce the same, is not allowed to prosecute it as the sole plaintiff: *Texas Ins. Co. v. Coffee*, 61 Tex. 287. Nor will a court enforce the surrender of the policy to the assignor, nor permit a collection of the amount due thereon from the insurance company, until the advances and payments made to preserve the policy are repaid: *Gilman v. Curtis*, *supra*. The *bona fide* assignee of insurance policies for value, without notice of equities, is protected under the rules of equitable estoppel, as where a policy of insurance was pledged for an advance, but the assignee permitted the policy to remain in the hands of the assignor, who was thus enabled to assign it to an innocent person who advanced a valuable consideration upon its endorsement and delivery. The latter was held to have not only the legal title, but the superior equity: *Wells v. Archer*, 10 S. & R. 412; *Le Feuvre v. Sullivan*, 10 Moore's Pr. C. C. 1; *Spencer v. Clarke*, L. R., 9 Ch. Div. 137. A wife, as beneficiary, executed a blank endorsement of a policy, and it was negotiated for value to an innocent holder. The wife sought to defeat the title of the assignee. The court said, "By placing her name on the back of the policy, at the request of her husband, and delivering it to him, she thus enabled him to procure the loan of money, and it would be opening the door to fraud to permit the wife to deny the power of the husband to fill up the assignment: *Norwood v. Guerdon*, 60 Ill. 253; *Pomeroy v. Man. Ins. Co.*, 40 Id. 398; *Damron v. Penn Mut. Life Ins. Co.*, 99 Ind. 479. So a company may be estopped by the admissions of its authorized agent, that a certain policy will be paid, where an innocent person advances money upon an assignment of such policy, relying upon such representations: *Ætna Life Ins. Co. v. France*, 94 U. S. 561. And a com-

pany is estopped after notice of an assignment to set up as a defence against a *bona fide* holder for value, that it paid the proceeds of the policy to the beneficiary or any other person : *Hall v. Dorchester Mut. Ins. Co.*, 111 Mass. 53 ; *Gale v. Lewis*, 9 Q. B. 742. But notice must be proved : *Northwestern Mut. Life Ins. Co. v. Roth*, 87 Penn. St. 409. And also, where it has consented to an assignment, to deny the validity thereof, as against a *bona fide* holder for value : *Ætna Life Ins. Co. v. France*, 94 U. S. 561 ; *Stevens v. Warren*, 101 Mass. 564 ; or to set up a prohibition in the policy against assignments without the consent of the company where made as collateral, or where the interests of the company are not affected : *Ellis v. Krentzinger*, 27 Mo. 311 ; *Griffey v. Ins. Co.*, 30 Hun 299 ; *Ins. Co. v. Kelly*, 32 Md. 421 ; *St. John v. Ins. Co.*, 13 N. Y. 31 ; nor where such clause is illegal : *Spare v. Ins. Co.*, 17 Fed. Rep. 568.

And where a policy was allowed by a company to lapse and be forfeited, but without the consent or knowledge of the beneficiary, and a new policy, issued in place thereof, was assigned as collateral to a *bona fide* assignee for value, the company was estopped as against the beneficiary from alleging her neglect to tender premiums due on a policy already forfeited ; and also estopped as against the innocent assignee, from setting up the defence that an assignee of an insurance policy could acquire no greater rights than those of his assignor : *Pilcher v. New York Ins. Co.*, 33 La. Ann. 322. And where a person seeking insurance makes a full and complete statement of all facts that materially affect the risk, and an agent of the company, acting on its behalf, of his own accord, writes false answers to the usual questions, to be signed by the applicant, with the advice to him that the omitted facts are immaterial, and the assured, in good faith, adopts the application as prepared, the company is estopped to deny its liability on the policy, after receiving premiums, a loss having occurred : *Massachusetts v. Mut. Life Ins. Co. v. Robinson*, 98 Ill. 324. Nor can an insurance company acquire any rights against a *bona fide* holder by mis-statements of facts and law made by its agents in its company's business relative to a forfeiture of a policy : *Tabor v. Michigan Mut. Life Ins. Co.*, 44 Mich. 324. But unauthorized representations of an agent will not create an estoppel : *Knight v. Mut. Life Ins. Co.*, 37 Leg. Int. 82.

The title of the assignee of an insurance policy being non-nego-

tiable in its character is, in the absence of any application of the rules of equitable estoppel, subject to all equities existing at the time of the transfer and to all defences valid as between the original parties. A valid policy was issued to a wife, and afterwards, by coercion, she executed an assignment of it, and the fraudulent assignee assigned it to a *bona fide* purchaser, without notice; it was held that no title could be acquired even by an innocent purchaser to a chose in action from one who has procured it from the owner by undue influence, compulsion or coercion: *Barry v. Equitable Life Ins. Co.*, 59 N. Y. 587. The assignee must, like other assignees of non-negotiable choses in action, inquire of the debtor, before advancing money, if any defence or equities exist in relation thereto, as a policy of insurance is not a representation of the company, but only a muniment of title, and no title can be acquired even by a *bona fide* assignee for value from one without title obtaining the same from a fraudulent agent: *Charter Oak Life Ins. Co. v. Smith*, 40 Ohio St. 414. And a rule that an assignee cannot rely upon the recitals of an insurance policy, was enforced in a case where by failure of an assignee to pay a premium note, although the policy recited that it was paid, a forfeiture thereof was sustained. *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32. Nor can an assignee of a policy as collateral require payment without complying with the terms of the policy by obtaining the receipt of the beneficiary indorsed thereon; *non constat* the debt may have been paid: *Kelley v. Caplice*, 23 Kan. 474. Nor can he rely upon unauthorized representations of an agent: *Knight v. Mutual Life Ins. Co.*, 37 Leg. Int. 82. Nor can any title be acquired to policies of life insurance where illegal although the loans and debts secured be larger in amount than the value of the policy: *Stokell v. Kimball*, 59 N. H. 13; and an assignment of policies by a wife as surety will be released by a discharge of an endorser: *O'Mara v. Nugent*, 37 N. J. Eq. 326.

The Rights of the Assignor.—The assignor or pledgor is entitled to a return of insurance policies upon complying with the terms of the agreement upon which such assignment was made. Although the assignment be absolute in terms, an agreement in parol that the assignor should have a right to redeem at any time upon repayment, with interest, of the premiums paid by the assignee, will be enforced in equity. Such right of redemption followed the policy into the hands of the assignee, and at all times affected his title:

Matthews v. Sheehan, 69 N. Y. 589. The rule was enforced in another case where an insurance policy was assigned in absolute terms, but the assignee (who was the agent of the company issuing the policy) delivered a receipt at the same time reciting that the assignment was as collateral security for the premium, and to be void if the note was paid at maturity, otherwise to continue for sole benefit of the agent. The company was notified of the assignment, but not of the receipt, and the note not being paid, the agent surrendered the policy. Prior to the surrender the company were informed of the facts, the assignor demanding a retransfer, the policy being of greater value than the amount of the note. Upon an equitable action to redeem, it was held that as no notice had been given to redeem before the surrender, it must be treated as made on account of the assignor as well as the assignee, and that he was entitled to any excess of value above the amount due on the premium note: *Dongan v. Mut. Ben. Life Ins. Co.*, 46 Md. 469. So, where an assignee of a policy holding the same as collateral security wrongfully surrendered it to the company, he was mulcted in damages for the conversion: *Wheeler v. Peters*, 40 Ohio St. 424. The pledgor is also entitled upon settlement to the benefit of any sums which have been collected by the pledgee on such insurance policies, and to which the assignor would be entitled on payment of the debt: *White v. British Empire Ins. Co.*, L. R., 7 Eq. 394.

Payment of the debt or the discharge of the obligation is essential to entitle the assignor to a return of collateral securities, as where policies of insurance were assigned as collateral security to secure the payment of certain bills of exchange, although an arbitration has fixed the amount of the account, the money not having been paid: *Scott v. Campbell*, 1 Camp. 216. And where assurance policies were assigned as collateral for the payment of a bond and mortgage, and the mortgage had been discharged, but the bond not paid: *Hollis v. Ins. Co.*, 12 Phila. 321. Nor can an assignor, who during minority as a beneficiary joined with his father in an assignment thereof as collateral to secure the assignee from liability as endorser, and under which the assignee had been obliged to pay a portion of the liability, repudiate the contract on coming of age, and recover the policy, during the lifetime of the assured, by an action of detinue: *Bowers v. Parker*, 58 N. H. 565. But it was held payment where a company issuing a policy

received it and other securities as collateral for the payment of premium notes, the policy by its terms being void if the assured died by his own hands, except as to any *bona fide* interest therein at the time of death. The company was held within the rule, and the proceeds of the policy having paid the debt, it was ordered to redeliver the other securities: *White v. Penn Mut. Life Ins. Co.*, 6 Mo. App. 587. And a deposit of policies as collateral was held within the exception: *Cook v. Black*, 1 Hare 390. Nor was it any defence to a suit upon the original indebtedness that the creditor held an insurance policy upon the life of the debtor as collateral: *Reeves v. Plough*, 41 Ind. 204; *Burrows v. Bangs*, 34 Mich. 304.

Insurable Interests as applied to Assignees.—An important question relative to the assignment of valid life insurance policies is, as to the intention of the parties in procuring such insurance, whether it is in fact a *bona fide* assignment, for a valuable consideration, or simply a cover for a gaming speculation in the life of the insured, and in arriving at such intention the extent or character of the insurable interest of the assignee in the life, is a fact for consideration: *Johnson v. Van Epps*, 14 Ill. App. 201. Generally, it may be said, that an assignee of valid insurance policies, in common with assignees of other *choses in action*, is entitled to the presumption that he is a *bona fide* holder for value, without notice: *Page v. Burnstine*, 102 U. S. 664. The fact that he has no insurable interest in the life of the assured does not create a presumption that he acquired his interest under such assignment for the purpose of speculating or gambling upon the life of the assured: *Clark v. Allen*, 11 R. I. 439. Nor is this fact either conclusive nor *prima facie* evidence that the transaction is illegal: *United Life Ins. Co. v. Allen*, 138 Mass. 240. No subsequent assignment can destroy the validity of a policy that was legal when issued: *Campbell v. New England Life Ins. Co.*, 98 Mass. 381; nor taint it as a wagering policy: *Mut. Life Ins. Co. v. Allen*, 50 Id. 18. Even where made the basis of a mere speculation or wager on the part of the assignee, so that no recovery is permitted to him, yet the beneficiary of the policy may enforce the same, the validity of the policy not being affected by the subsequent illegality. And unless there is some peculiarity about the rules that should govern the assignment of policies of insurance, where the assignee has no insurable interest in the life of the assured, the same rules as to its validity should

govern such assignments as are applied to assignments of interests under wills and vested remainders: *In re Irving*, L. R., 7 Ch. D. 419. In all these cases, although the value of the investment depends upon the life of a person in which the assignee has no interest except the expectancy of its cessation, the validity of such assignments is not questioned.

The courts have considered in several cases this question of the insurable interest required by the assignee to render valid an assignment of life insurance policies, and the general rule seems to be that such assignments are supported where a valid insurance policy has been issued, and the owner sells the same in a *bona fide* transaction, for the purpose of securing its present value, or where the owner, in a like *bona fide* transaction, assigns such policy as collateral to secure a *bona fide* advance or a valid debt, or some obligation as endorser or surety, and the advance or debt has been paid or the obligation discharged, although in the first case, the assignee has no insurable interest in the life of the insured at the time of the assignment, and in the second, his insurable interest has ceased, and he is an assignee as in the first case, without insurable interest in the life of the assured.

In a recent case, *Scott v. Dickson*, 16 W. N. C. 181, decided by the Supreme Court of Pennsylvania, a policy of life insurance was issued to Dickson, and upon delivery by the agent, Dickson said he wished to transfer the policy to Scott, "the best friend I have in the world." He executed the assignment, notice of it was sent to the company, but Scott was never informed of it. Scott, at the time, was surety on a penal bond given by Dickson, but the liability ceased, and at his decease he was without insurable interest in the life of Dickson. The assignment was supported on the ground that the original insurance was for the benefit of the assignee. The court (Mr. Justice PAXSON) say: *

"It requires but a moment's reflection to see that this rule [that the assignment of a policy does not fall upon the cessation of interest] is based upon sound principles. It treats a contract of life insurance not as a contract of indemnity, as in the case of fire and marine insurance, but as a contract to pay a certain sum of money in the event of death. And if a policy failed with the cessation of interest, it would lead to this result: A. is a creditor of B. to the extent of a \$1000, and insures his life to that amount, and continues the policy until he has paid in premiums say, \$1100. If

the policy ceases as soon as the debt is paid, A. loses all he has paid, and in reality is out \$100, although he has received the debt in full. * * * Policies of this sort are not in any sense wagering. It would be to deny a man's right to do what he will with his own to say that he could not insure his life for the benefit of an indigent relative or a friend to whom he felt under obligations. And the fact that he continues to pay the premiums himself, and retains the control of the policy up to the time of his death, leaves no room for speculation, or the improper practices of a few years ago which brought such a scandal upon the life insurance business of this state."

And referring to the case of *Gilbert v. Moore, infra*, said: "we do not regard this as within the authority of *Gilbert v. Moore*, for the reason that there is nothing in the facts as set forth in the case stated, from which the deduction can fairly be drawn that this was a wagering policy. On the contrary, there is enough to show that John F. Scott had an insurable interest in the life of Richard Dickson."

In an earlier case, *Cunningham v. Smith*, 70 Penn. St. 450, in which Smith insured his life, and immediately assigned the policy to the defendants, the court say: "Smith's interest in his own life was unquestionable, and if he was willing to insure himself, with their money, and then assign his policy to them there is no principle of law which can prevent such a transaction."

Another recent decision on this question was delivered by the Supreme Judicial Court of Massachusetts in the case of the *Mut. Life Ins. Co. of New York v. Allen*, 138 Mass. 24. This was a bill of interpleader filed by the insurance company to determine whether the wife of the deceased, the beneficiary in the policy, or the assignee, Allen, were entitled to the proceeds, the assignment being made for a sum paid, and the surrender of notes of the assured upon which surrender he had no insurable interest in the life. The court (W. ALLEN, J.) say: "The question is, whether the right to a sum of money payable on the death of a person under a contract in the form of an insurance policy has any special character or quality which renders it less assignable than the right to a sum payable at the death of some person under any other contract or assurance, or than a remainder in real estate expectant on such death. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his

own advantage, and we are of opinion that an assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gaming risk between him and the assignee, or a cover for a contract of insurance between the insurer and the assignee, will pass the equitable interest of the assignor; and that the fact that the assignee has no insurable interest in the life insured is neither conclusive nor *prima facie* evidence that the transaction is illegal. * * * The value and permanency of the interest is material only as bearing upon the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception it will not be avoided by a cessation of the interest. The mere fact that the assured himself has no interest in the life does not avoid or annul the policy. We think that the second ruling was correct, and that the fact that the assignee had no insurable interest in the life does not avoid the assignment. It is one circumstance to be regarded in determining the character of the transaction, but is not conclusive of its illegality."

The court, referring to *Stevens v. Warren*, 101 Mass. 564, and in effect overruling the case, as to the point in question, say: "The general rule laid down in *Stevens v. Warren*, that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life, and from which the inference that an assignee of a party must have an insurable interest, seems to have been drawn, we think, is not strictly accurate or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy, but it is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease, the policy would continue, and the insured would then have an insurance without interest."

The Supreme Court of the United States, in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, in which the policy was payable to a husband and wife, and they were afterwards divorced *a vinculo matrimonii*, the wife, having paid the premiums to the death of the husband, was allowed to collect the insurance, although her insurable interest had ceased at the time of the divorce. And Mr. Justice BRADLEY, speaking for the court said "We do not hesitate to say that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the insurance policy itself." And in *Etna Life Ins. Co. v. France*, 94 U. S. 561, where a policy was

taken out for the benefit of a sister, the court sustained the policy, saying that " he had a right to take out a policy on his own life for his sister's benefit, and she had a right to advance him the necessary moneys to do so. As between strangers or persons not thus clearly connected, the transaction would be evidence to go to the jury from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. Any person has a right to procure an insurance on his life and to assign it to another, provided it be not done by way of cover for a wager policy."

The rule that an insurable interest in the life of the assured is not essential to constitute a valid assignment of valid life insurance policies has been consistently applied by the courts of New York : *St. John v. American Mutual Life Ins. Co.*, 13 N. Y. 31 ; *Valton v. National Fund Life Ins. Co.*, 20 N. Y. 32. In a late case in the Court of Appeals, *Olmsted v. Keyes*, 85 N. Y. 593, a policy was issued to Olmsted, as trustee for the wife and children of Keyes, and the wife dying, and Keyes again remarrying, the trustee, at the request of the assured, assigned the policy to the second wife and children. The court say : " The rule as gathered from the authorities is that where one takes out a policy upon his own life as an honest and *bona fide* transaction, and the amount assured is made payable to a person having no interest in the life, or where such a policy is assigned to one having no interest in the life, the beneficiary, in the one case, and the assignee in the other, may hold and enforce the policy, if it was valid in its inception, and the policy was not procured, or the assignment made as a contrivance to circumvent the law against betting, gaming or wagering policies. It follows, therefore, that one may with the consent of the insurer, deal with a valid life policy as he can with any other chose in action, selling it, assigning it, disposing of it and bequeathing it by will ; and it has been well said that if he could not do it these life policies would be deprived of a large share of their utility and value."

The like rule has been enforced by the Supreme Court of Rhode Island, in *Clark v. Allen*, 11 R. I. 439, where a policy was assigned upon the surrender of a note for an amount larger than the surrender value of the policy. The court say : " If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest ? The truth is, it is one thing to say that a man may take

insurance upon the life of another for no purpose except as a speculation or bet on the chances of life, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy as a matter of business after it has once been issued under the sanction of law, and is therefore an existing chose in action or right of property which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality and no imminent peril to human life. * * * It is said that such an assignment, if permitted, may be used to circumvent the law. That is true if insurance without interest is unlawful, but it does not follow that such an assignment is not to be permitted at all, because, perhaps, it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. * * * Perhaps, *Cammack v. Lewis*, 15 Wall. 644, may be found a case of that kind."

The like rule has been enforced in New Jersey in *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. L. 576; and in *Martin v. Franklin F. Ins. Co.*, 38 Id. 140; in Vermont, in *Fairchild v. Life Ass'n.*, 51 Vt. 613; and in England, in *Dalby v. India & London Life Ass'n.*, 15 C. B. 365; *Law v. London Indisputable Life Policy Co.*, 1 Kay & J. 223. A. insured his life and afterward assigned it to B. for a nominal consideration; B.'s executors assigned the policy to C. for a nominal consideration, and C.'s executors sold it to D., and having a good title, were allowed to enforce the sale: *Ashley v. Ashley*, 3 Sim. 149.

It is also well settled law that an assignment of valid insurance policies will not be enforced by any court where the transaction of assignment itself shows the want of a good and valuable consideration, and the circumstances connected therewith demonstrate that the assignment was obtained simply as a cover for a gambling speculation or a wagering bet upon the chances of the life of another. And in considering the character of the transaction, the insurable interest in the life of the assured is a fact to be considered. The rule was applied in a case in the Supreme Court of the United States, *Warnock v. Davis*, 104 U. S. 775, where a valid policy of life insurance was procured and immediately assigned to a firm, upon an agreement that it should pay all premiums and assessments, and as consideration receive *nine-tenths* of the amount due thereon at his death. The firm paid the fees and assessments, and collected the agreed amount upon the death of the assured. Upon these facts

the court (Mr. Justice FIELD) say: "It was lawful for the association to advance to the assured the sums payable to the insurance company as they became due. It was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the policy beyond what was required to refund these sums with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life and encourage the evil for which wager policies are condemned. * * *

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is the character changed because it is for a portion merely of the insurance money to the extent that the assignee stipulates for the proceeds of the policy beyond the sum advanced by him, he stands in the position of holding a wager policy. * * *

In all cases, there must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise, the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independent of any statute on the subject, condemned as being against public policy. The same ground which invalidates the one should invalidate the other—so far at least as to restrict the right of the assignee to the sums actually advanced by him."

The like rule was enforced in *Cammack v. Lewis*, 15 Wall. 644, in which Lewis, being indebted \$70 to Cammack, at the instance of the latter, procured an insurance upon his life for \$3000, and assigned a two-thirds interest in the same to Lewis, and also gave him a note of \$3000, confessedly without consideration. Upon Cammack's death, which occurred after the payment of one premium, Lewis paid \$1000 to the widow and she brought an action to recover the remainder. The court (Mr. Justice MILLER) described the transaction so far as Cammack was concerned, as "a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3000 to cover a debt of \$70, is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretence to be a *bona fide* effort to secure the debt, and the strength of this fact is not diminished by the fact that Cammack

was to get \$2000 out of the \$3000 ; nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack." And the assignee was only allowed to retain the amount of the debt and the premium paid.

The latest case in Pennsylvania, *Gilbert v. Moose*, 104 Penn. St. 74, in which the rule announced in *Pritchett v. Ins. Co.*, 3 Yeates 458, decided in 1803, and recognised in later cases, *Edgell v. McLaughlin*, 6 Whart. 176 ; *Adams v. Ins. Co.*, 1 Rawle 97, was followed, arose from a transaction which stamped it as a mere speculation. Gilbert insured his life for \$2000, naming as beneficiary one Jacobs, who had no insurable interest in his life ; and he assigned the policy to Gilbert for \$28, who, after payment of one premium, collected the money due on the policy, Moose having died. His administrators were allowed to recover the money, less assessments, the policy being held valid. The court (GORDON, J.) say : " We do not overlook the fact that the status of Jacobs (the first assignee), is the point of this case, for if he was the proper and lawful beneficiary, then even were Gilbert without right, the plaintiffs could not recover, for proceeds of the policy would belong to Jacobs, and on the other hand, if his claim was not good he had nothing to assign to the defendant. But as a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. * * * Nor can we see that did the defendant's case rest on an assignment from Moose to himself, how it would be bettered in the least. The reserved point alleges that Gilbert took the assignment for the purposes of speculation, and of this there can be no doubt, for, for what other purpose could it have been taken ? But speculation, on what ? The life of Moose, and the sooner that was determined, the better the speculation. If there is any difference between this and an original wager policy, I confess I cannot see it."

The like rule was enforced in Indiana, in *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, where a policy for \$3000 was assigned for \$20. The policy became payable shortly afterwards, the assignee having paid but one premium. The Supreme Court say : " Life insurance policies are assignable ; but, in our opinion, they are not assignable to one who buys merely as matter of speculation without interest in the life of the assured." In *Missouri Valley Life Ins. Co.*, 18 Kans. 93, the Supreme Court of Kansas, in a case where a policy of insurance procured by one Haynes, for \$2000,

was assigned to Sturges, who was without insurable interest in his life, the assured dying in less than a year after the assignment, say : "If the assignment from Haynes to Sturges were to be upheld as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic concerning human life, and it would be opening the door wide and inviting to enter the most shocking crimes." See *State v. Winner*, 17 Kans. 298. The like rule has been enforced in Maine, in *Mitchell v. Union Life Ins. Co.*, 45 Me. 104 ; in Missouri, in *Singleton v. St. Louis Life Ins. Co.*, 66 Mo. 63 ; and in the United States Circuit, District of Missouri, by Judges DILLON and TREAT, in *Swick v. Home Life Ins. Co.*, 2 Dill. 161 ; and in Illinois, in *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35. In *Johnson v. Van Epps*, 14 Ill. App. 201, the court (PILLSBURY, J.,) say : "Whether a contract of insurance is void, being within the prohibition of the law against gambling, depends not so much upon the extent or character of the interest or the want of interest in such beneficiary, as it does upon the intention of the parties in procuring such insurance." See, also, *Langdon v. Union Mut. Ins. Co.*, 22 Am. L. Reg. (N. S.) 385, and note.

It is an equitable rule, however, that assignments of valid life insurance policies, although the circumstances attending such assignment are such that a court will refuse to enforce the same for the whole amount of the policy, for the reason that the transaction is, on its face, a mere speculation or gambling wager upon the life of the assured, are yet held valid in favor of assignees as to all sums actually loaned, with interest, and premiums and assessments paid by the assignee to preserve the vitality of the policy : *Warnock v. Davis*, 104 U. S. 775 ; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157 ; *Cammack v. Lewis*, 15 Wall. 643 ; *Harley v. Heist*, 86 Ind. 196. And this equitable right was enforced in favor of an assignee holding policies of life insurance as collateral in a transaction voidable for fraud : *In re Leslie*, L. R., 23 Ch. D. 552. And also where the assignment was partly void : *Scobey v. Waters*, 10 Lea 551.

And in other cases, a lien can be acquired upon policies by the payment of premiums under a contract with the beneficial owner, or where persons have advanced money to trustees for that purpose : *Clack v. Holland*, 19 Beav. 262 ; *Todd v. Moorehouse*, L. R., 19 Eq. 69.

WILLIAM COLEBROOKE.

RECENT AMERICAN DECISIONS.

Supreme Court of Massachusetts.

HINCKLEY v. GERMANIA FIRE INSURANCE CO.

The temporary illegal use, without a license, of property insured, if uncontroverted at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. It would simply vitiate the policy during the time of the illegal use, and when such illegal use stopped, the policy would revive.

It is not the necessary meaning of the word "void," as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which had once begun to run. The meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being.

Where a license is granted to two persons under Pub. St. c. 102, s. 111, to keep a billiard or pool table, or a bowling-alley, for hire, it is available to each of them.

THIS was an action of contract upon a policy of insurance against fire upon a pool table and other saloon fixtures. At the trial in the Superior Court a verdict was ordered for the defendant, and the case reported for the consideration of the Supreme Court.

J. M. & T. C. Day, for plaintiff.

M. & C. A. Williams, for defendant.

The opinion of the court was delivered by

C. ALLEN, J.—The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections, which we have considered.

In the first place, the defendants suggest that there is certainly great doubt whether the license under which the plaintiff was doing business on the day when the policy was dated and delivered was of any validity, since this license ran to both brothers, Edwin and Herbert, though Herbert had ceased to have any interest in the place before the license was dated and issued. No authority is cited or reason assigned for so strict a construction, and we are of opinion that a license duly granted to two persons, under Public Statutes c. 102, s. 111, to keep a billiard or pool table, or a bowling alley, for hire, is available to each of them. This is not like a case where two persons seek to avail themselves of a license granted to only one of them.

It is then urged that, after the license had expired, the plaintiff

kept the insured property, in violation of law, from May 1st 1883, till the last week in June 1883. The policy was dated March 15th 1883, and the license then existing, expired May 1st 1883. The fire occurred on August 6th 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds: *First*, that the illegality and criminality of the plaintiff's act in respect to the injured property, vitiates the policy by operation of law, independently of any express provisions contained in the policy; and, *secondly*, that under a provision of the policy the right to recover was taken away. The authorities cited in support of the first proposition do not support it. In *Kelly v. Home Ins. Co.*, 97 Mass. 288, the policy was on intoxicating liquors, which at the time of the insurance, and thereafter to the time of the loss, were intended for sale in violation of law. The policy never attached. There was never a moment when the liquors were not illegally kept, and all that the case decides is that goods so kept at the time when the policy issued, or at the time of the loss, cannot be the subject of a valid insurance. In *Johnson v. Union Ins. Co.*, 127 Mass. 555, the facts were similar. The policy was on billiard table, balls, cues, &c., kept without a license at the time the policy was issued, as well as at the time of the loss. The ground of the decision in both of the above cases is stated to be "that the object of the assured in obtaining the policy was to make their illegal business safe and profitable; and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and void, and the policy never attached." The same facts existed in *Lawrence v. National Ins. Co.*, 127 Mass. 557. In *Cunard v. Hyde*, 2 El. & El. 1, the cargo which was the subject of insurance was partly loaded on deck in violation of law, and while in that condition was totally lost.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was proved, as a mat-

ter of fact, that the plaintiff at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed; or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if un contemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and un contemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension of the risk, without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause in the policy giving them a right to cancel it upon notice, and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. "The doctrine that the risk may be suspended, and again revive, without an express provision for the purpose, seems to be within the strictest judicial principles:" 1 Phil. Ins. § 975. Accordingly, temporary unseaworthiness, if the ship has become seaworthy again, will not defeat the policy: 1 Phil. Ins. § 730. So as to other stipulations; as, *e. g.*, that of neutral character and conduct: *Id.* § 975. And in *Worthington v. Bearse*, 12 Allen 382, it was held, on great consideration by this court, that if the assured in a marine policy temporarily parts with his interest in the property insured, and afterwards buys it in again, the policy will revive, if there are no express provisions making it void, and there is no increase of risk. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence

as the forfeiture of his policy, in addition to the penalty of \$100, which the legislature have considered adequate as the maximum punishment for his offence against the public: Pub. Stat. c. 102, s. 111.

It is further contended by the defendants that, however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "This policy shall be void * * * if the insured shall make any attempt to defraud the company either before or after the loss; or if gunpowder or other articles subject to legal restrictions shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oil, or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil may be used for lighting." In this Commonwealth, under the statutes for the regulation of trade, and providing for licenses and municipal regulations of police, there are a great many articles which, in a certain sense, may be said to be "subject to legal restriction." Dogs, fish, nails, commercial fertilizers, hacks and horses, in cities, may be referred to as examples. It may well be questioned whether, under the maxim *noscitur a sociis*, the clause in the policy above quoted ought not to be limited in its application to other articles of a character similar to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void because an unlicensed dog was kept upon the premises; and yet such a dog, being subject to legal restriction, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But, irrespectively of this consideration, it is not the necessary meaning of the word "void," as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phil. Ins. § 975, it is said: "After it (*i. e.*, the policy) has begun, so that the premium is be-

come due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred. * * * And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances, or the express provisions of the policy, such application is excluded." In accordance with this doctrine, a provision in a policy that it should be void, and be surrendered to the directors of the company to be cancelled, in case of alienation of the property by sale or otherwise, was held to be inoperative for the time being; and the assured, upon acquiring title after a sale of the property by him, was held entitled to recover: *Lane v. Maine Ins. Co.*, 12 Me. 44. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent (*i. e.*, of the company), this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire: *Power v. Ocean Ins. Co.*, 19 La. 28.

The same rule of construction has been applied to provisions against other insurance: *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573; *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166; *Mitchell v. Lycoming Ins. Co.*, 51 Penn. St. 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss: *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Ins. Co. of North America v. McDowell*, 50 Id. 120, 129. Without at present going beyond what is called for by the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured, without a license, to come within the prohibition of the policy in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

The only remaining objection urged by the defendant is that the

statements of loss rendered to them by the plaintiff were insufficient, in failing to state that the plaintiff had no legal title to the injured property, and that the Spurrs had an interest in it. But there is no finding as a matter of fact that the plaintiff was not the owner of the property, and upon the report of the case we cannot say, as a matter of law, that it appears that he was not such owner: *Bailey v. Hervey*, 135 Mass. 172; *McCarty v. Henderson*, 138 Id. 310. Moreover, no attempt to defraud the defendants being proved or charged, the provision of the policy that a statement shall be rendered setting forth the interest of the insured therein was sufficiently complied with. There was no provision calling for an exact statement of his title or interest in detail, and a general statement of ownership was sufficient: *Fowle v. Springfield Ins. Co.*, 122 Mass. 191.

New trial granted.

This case presents an interesting question: Will the illegal use of property on premises insured, avoid a policy of insurance thereon?

Questions of this kind have most commonly arisen with reference to marine insurance. The general rule of law undoubtedly is, as stated by Judge STORY, that every contract made for or about a matter or thing which is prohibited, and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition: *Clark v. Protection Ins. Co.*, 1 Story 122. See also *Bartlett v. Vinor*, Carlton R. 252; *DeBegniz v. Armistead*, 10 Bing. 107.

Accordingly it has been decided where the insurance was on goods, a part of which were by law prohibited from exportation, and the voyage as to such goods was illegal in its origin, that therefore the whole policy was void: *Parkin v. Dick*, 2 Camp. 221; 11 East 502; *Margyatt v. Wilson*, 8 Term R. 31; *Bird v. Pigou*, 2 Selwyn N. P. 991. See also, *Law v. Goddard*, 12 Mass. 112; *Breed v. Eaton*, 10 Id. 21. But while this principle was conceded in *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102;

it was intimated that insurance was not void on a voyage prohibited by the trade laws of a foreign state, nor on goods contraband of war against capture and condemnation on that account, if in either case the facts are known to the underwriter, and the risks are not excepted in the policy; and in either of the two latter cases if the policy is void as to those particular risks, it is still good against other risks within it. Still another line of cases hold that if the voyage as originally insured was valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property not tainted by such illegality, although connected with the *res gestæ*: *Butler v. Allnutt*, 1 Starkie 222; *Keir v. Andrade*, 6 Taunt. 498; *Sewell v. Roy. Ex. Ins. Co.*, 4 Id. 855; *Ocean Ins. Co. v. Polleys*, 13 Pet. 157. Where a ship was insured on a voyage to Liverpool, and took on board in the port of New Orleans, a chain cable, smuggled by another vessel, and was lost on the voyage to Liverpool by perils of the sea, the underwriters were held liable for a total loss on the policy, and it was held also that the insurance on the chain cable was good, the title being in the owner of the vessel, and the illegality not attaching

to the voyage on which it was used : *Clarke v. Protection Ins. Co.*, 1 Story 110.

Coming to contracts to insure property on land, we find that they may be tainted with illegality and avoided. Thus it has been decided that a contract of insurance made on Sunday, and not subsequently ratified is void : *Heller v. Crawford*, 37 Ind. 279. It has not been unusual to insert in policies of insurance, a proviso that the insurance should be void if the building or property should be used for any unlawful purpose. Such a proviso is valid and will be enforced. The policy will be vitiated, for example, by a tenant's use of the building for an unlawful purpose, even if without the owners' knowledge : *Kelly v. Worcester F. I. Co.*, 97 Mass. 285. And the use of a building for storing whiskey with intent to sell the same therein, and the sale of the same there from time to time, by retail, without a license is a use of the building for an unlawful purpose within the meaning of such a proviso as above mentioned : *Kelly v. Worcester M. F. I. Co.*, 97 Mass. 284 ; *Johnson v. Union M. & F. I. Co.*, 127 Id. 555 ; *Lawrence v. National F. I. Co.*, Id. 557. In the Kelly case there appears to have been a proviso in the policy, prohibiting the unlawful use. Such a provision, however, does not appear in the reports of the Johnson and Lawrence cases, and in the Johnson case it is explicitly said, speaking of the Kelly decision, that "the grounds on which that decision was placed, were that the object of the assured in obtaining the policy was to make their illegal business safe and profitable, and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the policy was illegal and void, and the policy never attached."

In *Niagara F. I. Co. v. DeGraff*, 12 Mich. 124, it is decided that spirituous liquors kept illegally for sale, may notwithstanding, be lawfully insured against

destruction by fire, and that the risks insured against are not the consequences of illegal acts, but accidents. The court, Justice CAMPBELL, said : "It was claimed on behalf of the plaintiffs in error that if these liquors can be allowed to be included in a policy, the policy will be to all intents and purposes insuring an illegal traffic ; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact, that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage that voyage is the only one upon which the insurance would apply, and the underwriters become thus directly a party to an illegal act. So insuring a lottery-ticket requires the lottery to be drawn in order to attach the insurance to the risk. If the policy were in express terms a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are, not the consequences of illegal acts but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors or prevent title being transmitted but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties : *Hibbard v. People*, 4 Mich. 125 ; *Bagg v. Jerome*, 7 Id. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for directly illegal purposes. Collateral contracts, in which no illegal design enters, are not affected by an illegal trans-

action with which they may be remotely connected. In the case of *The Ocean Ins. Co. v. Polleys*, 13 Pet. 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States, was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong v. Toler*, 11 Wheat. 258, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognised by law to exist."

In *Carriagan v. Lycoming F. Ins. Co.*, 10 Ins. Law. Jour. 606, it is decided that the illegal sale of liquors, where such sale is but a subordinate part of the legitimate business of a druggist, does not vitiate the policy on his stock including such liquors. The court in this case took the position that a contract directly insuring liquors intended for illegal sale would be void, but that if the contract is collateral and independent, though in some measure connected with acts done in violation of law, it is not void.

In *Jones v. Fireman's F. Ins. Co.*, 2 Daly 307, the defendants issued a policy

of insurance upon plaintiff's "stock of fireworks—hazardous and extra-hazardous," providing, however, "that the policy shall be null and void whenever any article shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for in this policy." The plaintiff kept some dangerous "colored lights," contrary to a city ordinance, which "colored lights" ignited and caused the loss: *Held*, that the written provision insuring the fireworks, &c., was not repugnant to or a waiver of the printed part, the meaning being that the plaintiff might keep only such fireworks as it was lawful to keep under the municipal regulations, and he having violated the regulation in keeping the colored lights that caused the fire, he could not recover.

But in *Boardman v. Merrimack F. Ins. Co.*, 8 Cush. 583, it was decided that the drawing of a lottery with the consent and participation of the assured in a building insured against loss by fire, as "a shoe manufactory," does not avoid the policy on the building, nor on the stock therein.

ADELBERT HAMILTON.

Court of Errors and Appeals of Maryland.

LOUIS DE BIAN v. CARLOS GOLA.

A consul signing a note as consul is individually liable thereupon.

The consular seal does not make the note a single bill.

APPEAL from the overruling of a motion to quash an attachment in an action of assumpsit founded on promissory notes in the following form:

ROYAL CONSULAR AGENCY OF ITALY,
Baltimore, 2d June 1882.

Received from Charles Gola, Esq., for the use of this Vice-Consulate of Italy, \$1500, to be returned within ninety days, with the usual interest and commissions.

[Seal marked.]

E. DE MEROLLA.

Royal Consular Agency of Italy.

Another attaching creditor moved to quash on the grounds, *inter alia*, that the instruments were under seal and were given by De Merolla only in his representative capacity as vice-consul. The court below refused the motion to quash, and the present appeal was taken.

W. S. Bryan, Jr., and M. R. Walter, for appellants.

Charles Poe, for appellee.

The opinion of the court was delivered by

YELLOTT, J. (after disposing of some minor questions of practice.)—There is nothing whatever on the face of these notes to show that Merolla intended to make them sealed instruments in the legal acceptance of that term, or that Gola received them as such. It is apparent that Merolla borrowed these several sums from Gola at a short date, and that he, Merolla, promised to return them, and that Gola looked to him for the money. The seal impressed upon the paper was not De Merolla's seal, but the seal of the Vice-Consulate of Italy, at Baltimore. He may have thought it added to the respectability of the transaction to impress his official seal on the paper, and even in one case to prefix his title of "Vice-Consul of Italy" to his name, but the papers themselves only amount to an acknowledgment that he, Merolla, had borrowed these sums of money and would return them. What "use" he put the money so borrowed to is and was entirely immaterial to the lender, and does not affect the contract. There are many "uses" that De Merolla could have borrowed this money for besides for the use of the "Vice-Consulate of Italy," but none of such "uses" could affect the contract between Gola and himself, whether expressed in the receipt or not. The theory that these notes or receipts are obligations resting upon the Vice-Consulate of Italy at Baltimore, and to be assumed and paid by De Merolla's successor in office, or to put the matter plainly, that the Italian government, for that is what such a theory would mean, would issue bonds or pay for all money borrowed by a vice-consul does not deserve any serious consideration.

We think the judgment should be affirmed.

RITCHIE, J., dissenting (after alluding to the minor points of practice).—The short-note declares upon the evidences of debt as filed in assumpsit, and alleges the personal liability of De Merolla. It is contended by appellants that the obligations were given by De

Merolla only in his representative character as consul, and that the appellee must resort for their payment to the vice-consulate, or, in effect, to the Italian government alone; and, further, that the contracts are under seal, and must be declared on as specialties. This attachment does not proceed upon fraud, practised by De Merolla in procuring the money lent on the notes, but on the notes themselves as produced. There must be an agreement between the cause of action as set out in the affidavit and vouchers, and the averments of the short-note or declaration; otherwise the attachment will not be supported; *Browning v. Pasguny*, 35 Md. 204; *Del-lone v. Hull*, 47 Id. 42.

If it be apparent from the face of the instruments that the debt was not contracted by De Merolla individually, but was on behalf of his government alone, the variance will be fatal, without reference to whether the instruments are sealed or not.

It is well established that the rules relating to private agents and their principals are not applicable to public officers. Story in his work on Agency, sect. 303, having previously discussed the general law of agency, including that relating to agents or factors of foreign principals, says: "Hitherto we have been considering the personal liability of agents on contracts with third parties in cases of mere private agency. But a very different rule prevails in general in regard to public agents; for in the ordinary course of things an agent, contracting in behalf of the government or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract were the agency one of a private nature. The reason of the distinction is that it is not to be presumed that the public agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him in his public character means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made on the credit and responsibility of the government itself as possessing an entire ability to fulfil all its contracts far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting important offices of trust

under the government if they were held personally liable upon all their official contracts." And in the following section adds: "This principle not only applies to simple contracts, both parol and written, but also to instruments under seal which are executed by agents of the government in their own names and purporting to be made by them on behalf of the government; for the like presumption prevails in such cases that the parties contract, not personally, but merely officially within the sphere of their appropriate duties." Cited in the margin, among others, are the leading cases on this subject of *Hodgson v. Dexter*, 1 Cranch 345; *Macheath v. Holdiment*, 17 Conn. 172; *Unvin v. Wolsely*, Id. 674.

Kent, in his Commentaries, Vol. II., sec. 633, affirms the same doctrine, as indeed do all the text books, and adds: "But the agent, in behalf of the public, may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all cases is, to whom was the credit in the contemplation of the parties intended to be given?"

This question, where the contract is in writing, must be primarily determined by recourse to the instrument itself.

BIGELOW, C. J., in *Bray v. Kettell et al.*, 1 Allen 83, in construing the contract of an agent for a foreign principal, thus succinctly announces the doctrine to be: "But even in such a case the fact that the principal is resident in a foreign country is only one circumstance entering into the question of credit, and is liable to be controlled by other facts, so in the case of a written contract; it depends on the intention of the parties. But this, as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent. But when the terms of the contract are clear and unambiguous, it must be deemed the final repository of the intention of the parties, and its construction and legal effect cannot be varied or changed by reference to facts or circumstances affecting the convenience of the parties or the reasonableness of the contract into which they have entered."

Upon an examination of the evidences of debt produced in this case, it seems clear beyond question that De Merolla executed them, not in his individual or private, but in his consular or official

capacity. They are dated at the consulate office, the sum borrowed is explicitly stated to be "for the use of this Vice-Consulate of Italy," not his own use, and the obligation to repay the money is not expressed in the usual form of a personal undertaking. "I promise to pay," but the terms employed are, "to be returned," &c. Superadded to all this there is attached, not his private seal, but the public seal or stamp of the Vice-Consulate itself. This seal could perform no private office, but can be explained only as an attestation to an instrument of a public nature; whether to give it the legal character of a specialty or furnish evidence of its genuineness is immaterial.

Many good reasons suggest themselves why the lender of the money would have preferred to give credit to the Vice-Consulate or the government of Italy, instead of accepting, without security, the merely personal obligation of De Merolla; and it is the only reasonable and natural construction of the terms of the instruments that such was their intention and effect.

I. *Private Agents*.—It is a general rule that one who signs his name to a contract, no matter what other words he adds, enters into a personal contract on which he may personally sue and be sued. The added words, such as "president," "committee," "trustee," "director," &c., have no legal significance; their omission constitutes no variance, and they in no way affect the rights and liabilities of the contracting parties. Thus, a note signed "S. J. Tilden, Vestryman, Grace Church," is S. J. Tilden's personal note: *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197. And we find the same decided of added words, such as "president and directors of A. Railroad:" *Pack v. White*, 78 Ky. 243; *Rendell v. Harriman*, 75 Me. 497; 46 Am. Rep. 421; *Buffalo v. Bitter*, 87 N. Y. 250; "Trustees of B. Lodge," *McClellan v. Robe*, 93 Ind. 298; *Williams v. Lafayette*, 83 Id. 237; "Trustees of C. Twp.," *Revolving Sc. v. Tuttle*, 61 Iowa 423; 47 Am. Rep. 816; *Wing v. Glick*, 56 Iowa 473; 37 Am. Rep. 142 note; *American v. Stratton*, 59 Iowa 696; "Trustees of D. Church," *Dayton*

v. Warne, 43 N. J. L. 659; *Hayes v. Brubaker*, 65 Ind. 27; "building committee," *Anderson v. Pearce*, 36 Ark. 293; 38 Am. Rep. 39; "representing B.," *Grau v. McVicker*, 8 Biss. C. Ct. 13; "agent," *Zeigler v. Wells*, 28 Cal. 263; *Fuw v. Meals*, 65 Ga. 711; *Graham v. Fuhnestock*, 5 Gill 215; *Stewart v. Katz*, 30 Md. 334; *Buffum v. Chadwick*, 8 Mass. 103; *Pratt v. Beaupre*, 13 Minn. 187; *Bank v. Cook*, 38 Ohio St. 442; *Bryson v. Lucas*, 84 N. C. 680; 37 Am. Rep. 634; "cashier," *Fairfield v. Adams*, 16 Pick. 382; "curator," *Lipscomb's Ward*, 2 Tex. 277; "guardian," *Carskadden v. McGhee*, 7 W. & S. 140; "trader," *Clark v. Lowe*, 15 Mass. 476; "tailor," *Janes v. Whitebread*, 11 Com. B. 406; "treasurer," *Ross v. Brown*, 74 Me. 352; "colonel," *McWilliams v. Willis*, 1 Wash. (Va.) 199; "overseer of the poor," *Bay v. Cook*, 2 Zab. (N. J.) 343; "survivor," *Vandenhorst v. Storrs*, 3 Conn. 203, 207; *Parsons v. Boyd*, 20 Ala. 112, 116; "& Co.," *McCool v. McClune*, Harp. S. C. 486; *Truscott v. King*, 6 Barb. 346; "trustee," *Gill v. Carmine*, 55

Md. 342; "administrator," *Gayle v. Ennis*, 1 *Tex.* 184, 187; *Wallis v. Lewis*, 2 *Ld. Raym.* 1215; *Baker v. Hathaway*, 5 *Allen* 103, 105; *Mowry v. Adams*, 14 *Mass.* 327, 329; *Felty v. Young*, 18 *Md.* 163, 168.

The contract may, by express terms or clear implication, show a contrary intention, and save the signer from personal liability: *Higgins v. Senior*, 8 *Mees. & W.* 834; *Glenn v. Allison*, 58 *Md.* 527; and a contemporaneous oral agreement that such personal liability should not exist may be proved: *Wake v. Harrop*, 30 *L. J. Ex.* 273; 31 *Id.* 451; *Metcalf v. Williams*, 104 *U. S.* 93. But oral evidence is not admissible, in a case where the signer's liability is in question, to show that the contract was not the contract of the signer but that of some other person or of some corporation: *Williams v. Lafayette*, 83 *Ind.* 237; *Rendell v. Harriman*, 75 *Me.* 497; 46 *Am. Rep.* 421. The only safe way, therefore, for a person to sign a contract made in a representative capacity is, "such and such an estate," or "corporation," or "person," by "A., president," or "by B., agent," or "by C., trustee:" *Hitchcock v. Buchanan*, 105 *U. S.* 416; *Turner v. Potter*, 56 *Iowa* 251; *Castle v. Belfast*, 72 *Me.* 167; or to expressly stipulate in the contract that he shall not be personally liable.

Such hard cases have arisen under this rule that it has sometimes been ignored or disregarded. See *Metcalf v. Williams*, 104 *U. S.* 93; *Whitney v. Wyman*, 101 *Id.* 392; *New Market v. Gillet*, 100 *Ill.* 254; 39 *Am. Rep.* 39; *Hypes v. Griffin*, 89 *Ill.* 134; *Wallis v. Johnson*, 75 *Ind.* 368; *Armstrong v. Kirkpatrick*, 79 *Id.* 527; *Purniton v. Security*, 72 *Me.* 22; *Simpson v. Garland*, *Id.* 40; 39 *Am. Rep.* 297; *Glenn v. Allison*, 58 *Md.* 527; *Stearns v. Allen*, 25 *Hun* 538; *Whitford v. Laidler*, 94 *N. Y.* 145; 46 *Am. Rep.* 131; *Fowler v. Kerchner*, 87 *N. C.* 49; *Markley v. Quay*, 14 *Phila.*

164. And in Georgia the rule is changed by statute: *Fleming v. Hill*, 62 *Ga.* 751.

II. *Public Agents*.—There is no doubt of the existence of the distinction between public and private agents referred to in the dissenting opinion above. If a public agent acts within his authority and makes known the fact that he is contracting in his representative capacity, he is not liable though he contracts in his own name: *Hodgson v. Dexter*, 1 *Cr.* 345; *Dvinelle v. Henriquez*, 1 *Cal.* 387; *State v. McCauley*, 15 *Id.* 429; *Perry v. Hyde*, 10 *Conn.* 329; *Yulee v. Canova*, 11 *Fla.* 9; *Ghent v. Adams*, 2 *Ga.* 214; *Copes v. Matthews*, 18 *Miss.* 398; *Tutt v. Hobbs*, 17 *Mo.* 486; *Stanly v. Hawkins*, *Mart.* 52; *Daves v. Jackson*, 9 *Mass.* 490; *Freeman v. Otis*, *Id.* 272; *Brown v. Austin*, 1 *Id.* 208; *Bainbridge v. Downie*, 6 *Id.* 253; *Stoughton v. Baker*, 4 *Id.* 522; *Enloe v. Hall*, 1 *Humph.* 303; *Miller v. Ford*, 4 *Rich.* 376; *Amison v. Ewing*, 2 *Caldw.* 366; *Tutt v. Lewis*, 3 *Call.* 233; *Syme v. Butler*, 1 *Id.* 105; *Adams v. Whittlesey*, 3 *Conn.* 560; *Osgood v. Grosvenor*, 1 *Root* 89; *Walker v. Scarthout*, 12 *Johns.* 443; *McCurdy v. Rogers*, 21 *Wis.* 197. But he is bound if he does not disclose the fact that he is making a public contract: *Sheffield v. Watson*, 3 *Caines* 69; *Swift v. Hopkins*, 13 *Johns.* 313; or uses words showing his intention to bind himself: *McClenticks v. Bryant*, 1 *Mo.* 598; or transcends his authority: *New York v. Harbison*, 16 *Fed. Rep.* 688; *Clenticks v. Bryant*, 1 *Mo.* 598; *Hammarskold v. Bull*, 11 *Rich.* 493; or it appears the credit was given to him: *Lapsley v. McKinstry*, 38 *Mo.* 245; *Brown v. Rundlett*, 15 *N. H.* 360. A consul has no right to borrow money for his government; it is not within the scope of his authority, and therefore Merolla was liable on the note in the principal case. DAVID STEWART
Baltimore.

Supreme Court of Wisconsin.

COMSTOCK v. BECHTEL.

An insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay, or defraud his creditors; but the property so purchased does not, for that reason, cease to be exempt. The only remedy of the creditors is by attacking the sale of the non-exempt property.

APPEAL from Circuit Court, Dane county.

Replevin for two horses, one harness, one sleigh, one wagon, and two cows, alleged to have been levied upon and seized by the defendant, who was the sheriff of Dane county, by virtue of a certain attachment, and an execution duly issued by the circuit court of that county against the property of the plaintiff, and in the hands of such sheriff for service. The plaintiff claims that the property in controversy is exempt from seizure by virtue of such writs.

In his answer the defendant justifies the seizure of the property by virtue of the aforesaid writs, and alleges that the same is not exempt from being so seized, because the plaintiff was one of a firm hopelessly insolvent, against which judgments for large amounts had been rendered, and others were about to be entered in actions then pending, and that plaintiff, for the purpose of defrauding the creditors of such insolvent firm, sold certain notes and securities owned by him, and not exempt, and with the proceeds thereof purchased the property so seized with the intention of holding it as exempt property.

The cause was tried by the court without a jury. The court found that the defendant was sheriff of Dane county, and as such, by virtue of valid process, seized the property claimed on February 1st 1884, and that at the time of such seizure the same was all the personal property which the plaintiff owned; also that the value of the property was \$685, and that the amount for which such writs were issued exceeded that sum. The more material findings of fact are as follows: “(5) That on the thirty-first day of December the said plaintiff was the owner of, and held in his own name, a note secured by mortgage upon real estate of the value of twelve hundred dollars (\$1200), and one note of the value of one hundred dollars (\$100). (6) That at this time the said plaintiff was heavily indebted and wholly insolvent; that said plaintiff, although repeatedly requested by his creditors to pay his indebtedness, immediately

preceding the date of the purchase of said property, to wit, January 1st 1884, neglected so to do; that said plaintiff, at the time so requested by his creditors to pay his indebtedness, stated to his said creditors that he was unable to pay, and that he did not have or own any property or money wherewith to pay and discharge his indebtedness. (7) That said plaintiff did, on the 31st day of December 1883, dispose of and sell said notes to one Stewart Shampnor, and thereby intended to prevent and keep his creditors from levying on said note for the purpose of satisfying their claims, and that the said plaintiff, on the 1st day of January 1884, did use the funds by him raised on the sale of the notes as aforesaid, and applied said funds in payment of the purchase price of the property above described, and by him so claimed as personal exemptions, and that the said plaintiff, by said purchase of said property, intended to and did acquire the personal property exemptions by law provided, and that said plaintiff, by said immediate purchase, intended to prevent his said creditors from interfering with his said rights to acquire said personal property exemptions by means of their levying on and applying said moneys in satisfaction of their claims and demands against him."

As conclusions of law the court found "that said plaintiff is entitled to the return of said property, and to hold it as his personal property exemptions;" also that he was entitled to recover nominal damages and costs. Judgment for the plaintiff was ordered and entered accordingly. The defendant appeals.

La Follette & Siebecker, for respondent.

Rufus B. Smith, for appellant.

The opinion of the court was delivered by

LYON, J.—The circuit court found that the plaintiff sold the notes mentioned in the findings of facts with the intention of preventing a seizure thereof by his creditors; and that, with the proceeds of the notes, he purchased the property in controversy, intending thereby to acquire exempt personal property which would be beyond the reach of his creditors. That such were the intentions of the plaintiff is the inevitable conclusion from the facts of the sale of the notes and the purchase of the property, because it must be presumed that the plaintiff intended the necessary results of his acts, and it was the necessary and inevitable result of such sale and pur-

chase (if valid) that the notes, and the property purchased with the proceeds thereof, were thereby placed beyond the reach of creditors of the plaintiff. The intention of the plaintiff is, therefore, rather the subject of a conclusion of law to be deduced from the facts, than an independent fact in the case. The findings would not have been any more favorable to the plaintiff had nothing been said therein concerning his intentions; and for like reasons they would not be any less favorable to him had the court found expressly that such sale and purchase were made by the plaintiff with intent to hinder, delay, or defraud his creditors. That also is the subject-matter of a deduction from the facts.

The material facts are, therefore, that the plaintiff was wholly insolvent; that he owned two notes which were liable to be reached by his creditors; and that he sold such notes, and, with the proceeds, immediately purchased the property in controversy. From these facts the intention of the plaintiff to place his property beyond the reach of legal process must be presumed. The precise question to be determined is, therefore, is property which under the statute (Rev. St. 781, sec. 2982, § 6) is ordinarily exempt from seizure on attachment or execution liable to such seizure if the debtor is insolvent, and has purchased the property with the proceeds of other property, not exempt, with the intention of holding the property so purchased as exempt, and thus preventing his creditors from collecting their debts out of his property? The question now arises for the first time in this court.

The creditors whom the defendant (the sheriff) represents do not attack the validity of the sale of the notes by the plaintiff, or the purchase by him of the property in controversy. On the contrary, their theory necessarily is that both the sale and purchase are legal transactions,—the sale divesting the plaintiff of all title to the notes, and the purchase vesting in him a good title to the property thus acquired. But they maintain that because the notes might have been reached by legal process while the insolvent debtor owned them, it ought to be held that no right of exemption to the property purchased with the proceeds of the notes ought to be upheld. Several cases are cited by counsel for defendant to this proposition, and it is doubtless sustained by some of them, particularly by *Riddell v. Shirley*, 5 Cal. 488; *Emerson v. Smith*, 51 Penn. St. 90; *Brackett v. Watkins*, 21 Wend. 68; *Grimes v. Bryne*, 2 Minn. 104 (Gil. 72); *In re Wright*, 3 Biss. 359; *Pratt v. Burr*, 5 Id.

36. It is understood, however, that the opposite doctrine now prevails in California and New York. See *Randall v. Buffington*, 10 Cal. 491; *Wilcox v. Hawley*, 31 N. Y. 648.

We think it must be conceded that there are very serious objections to the doctrine which the cases first above cited (and perhaps others) seem to assert. In the first place, it interpolates a qualification or limitation in the statute of exemptions not written therein by the legislature. The statute exempts the specific property therein mentioned absolutely and unconditionally. The rule of these cases is that it shall not be exempt at all if purchased by an insolvent debtor with the proceeds of non-exempt property. This court has steadily held that it has no authority to make such interpolations: *Harrington v. Smith*, 28 Wis. 43; *Chase v. Whiting*, 30 Id. 544.

Counsel for the defendants seeks to avoid the force of this principle by saying that courts do, by construction, sometimes ingraft exceptions upon statutes, and he refers, as an illustration, to the line of cases which hold that the contributory negligence of the injured party will defeat a recovery in an action against a town to recover damages for an injury alleged to have been caused by a defective highway, whereas the statute giving the right of action contains no such qualification of the right. The cases are not parallel. The statute gives a right of action only when the injury is caused by the insufficiency of the highway. The courts merely hold that the injury is not so caused if the negligence of the injured party contributes proximately to it. These are cases of authorized construction of the words of a statute. In this case we are asked to ingraft a limitation upon a statute when there is not a line or a word therein which will justify it.

Again, the doctrine under consideration rests upon the ground that exemption is merely a personal privilege of the debtor which the courts may lawfully adjudge forfeited for his fraud and dishonesty. This is too narrow a view. Our exemption laws were enacted in obedience to the mandate of the constitution: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognised by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." Art. 1, § 17.

This mandate and these laws are grounded in the soundest considerations of public policy, in that they are designed to secure not

only to the debtor, but to his family, the necessary comforts of life, as against his creditors; thus protecting and guarding the highest interests both of the individual citizen and of the family, the benefits of which to the state can scarcely be overrated. In *Maxwell v. Reed*, 7 Wis. 582, Mr. Justice SMITH spoke of the exemption laws as "one of the great bulwarks of individual freedom and manly citizenship so carefully guarded by the fundamental law." In dealing with the exemption laws this court has steadily kept these considerations in view, and has rejected every construction of them which would tend to defeat the beneficent purposes for which they were enacted. It has always given them a liberal construction in favor of the exemption, and in the case last cited, it held that a stipulation in a note, waiving the benefit of such laws in respect to the indebtedness thereby created, was inoperative and void because opposed to a sound public policy. The principles upon which this court has uniformly thus acted seem to be disregarded in the cases which hold that in a case like this the right of exemption is forfeited.

Moreover, the rule of these cases would deprive insolvent debtors of the right to acquire any exempt property with the proceeds of property not exempt. An insolvent debtor may have \$50 in his pocket. While he retains the money his creditors may reach it by legal process. Under the rule above mentioned, if he should purchase a cow with the money, no matter how sorely he and his family may need the cow, the creditor may seize and sell her upon execution. And this, not because it was a fraud on the creditor for the debtor to purchase the cow with his own money, but because such a use of the money operated in some mysterious way to repeal the exemption laws in respect to that particular cow.

For the reason above suggested we cannot approve the doctrine of the cases relied upon by the defendant to defeat the plaintiff's right of exemption in the property in controversy. The true rule is if the plaintiff made a fraudulent sale of the notes his creditors may reach them in the hands of the fraudulent purchaser, collect or sell them, and apply the proceeds on their demands. That is their only remedy against the fraud, and the sale of the notes is the only fraud in the transaction. The purchase by the plaintiff of exempt property with the proceeds of the notes was a legal transaction, containing no element of fraud. The absolute title to the property so purchased vested in the plaintiff, one of the incidents

of which was the right under the exemption laws to hold it against his creditors.

The foregoing views are sustained by a large number of cases cited by counsel for plaintiff. We are satisfied that these cases lay down the correct rules of law applicable to this case. It follows that the plaintiff is entitled to hold the property claimed exempt from seizure, and hence that the case was correctly decided by the circuit court.

Judgment affirmed.

In 1857, it was held by Mr. Justice MILLER, in *Pratt v. Burr*, 5 Biss. 36 (U. S. Ct. for Dist. of Wisconsin), that where the defendant purchased goods of the plaintiff with which to replenish a stock which he afterwards sold, and purchased exempt property with the proceeds, the exemption in such case could not be sustained. "The mere statement of the facts," said the learned judge, "decides this case, in the conscience of every man, that neither in law nor justice the exemption should be allowed. The defendant cannot expect the court to assist him in consummating the intended fraud. A party cannot turn that which is granted him for the comfort of himself and family into an instrument of fraud."

In *Riddell v. Shirley*, 5 Cal. 488, an insolvent debtor sold certain personal property to the plaintiffs for the purpose of raising money with which to discharge debts which were a lien upon his homestead. A creditor attached the goods, and the plaintiff brought replevin for them. HRYDENFELDT, J., said: "Although the law secures the homestead from execution arising from ordinary indebtedness, it is yet made chargeable for debts by the act of the parties interested in its preservation, and in some instances by operation of law. Where such cases exist, it would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not, after becoming a source of credit, be relieved intentionally, by the disposition of all the other property of

the debtor, leaving nothing for the satisfaction of the other creditors. Such a sale, except to a creditor, in payment of his debt, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. It is a sale with the direct intent of benefit or advantage to the seller, to the injury of the creditor." See *Re Wright*, 3 Biss. 359.

In *Randall v. Buffington*, 10 Cal. 491, CH. J. FIELD said: "For the disposition of this case, we shall assume the fact that his insolvency was established, and, upon this assumption, it is difficult to perceive how the payment of a debt which he legally owed, and which was past due, can be tortured into an act to hinder, delay and defraud creditors. The debt was as sacred as any other debt, the obligation to pay it was as binding, and, even if the payment constituted a preference, there is no rule of law which prevents a debtor, in insolvent circumstances, from the application of his property to the payment of one debt rather than another: *Dana v. Stanfords*, 10 Cal. 269; *Nicolson v. Leavitt*, 4 Sand. 252; *Cowanhoven v. Hart*, 21 Penn. St. 495; *Worland v. Kimberlin*, 6 B. Mon. 608; *Kennaird v. Adams*, 11 Id. 102.

"But, it is urged with apparent confidence in the conclusive character of the position, that the payment resulted to the benefit of the defendant, as it relieved his homestead of the encumbrance, and, consequently, of liability of being sold for its satisfaction. We confess our inability to see what difference

this can make in the transaction. The obligation to pay the debt was not the less binding because it was secured by mortgage; and, if a lien was removed from the homestead, it was the consequence of an act lawful in itself. The payment conferred upon the debtor no new right. He owned the homestead free from liability before the debt of the plaintiff was contracted, and he simply restored its former exemption by paying a debt which he had incurred upon its security.

"The case of *Riddell v. Shirley*, 5 Cal. 488, is a very different one from this. In that case there was a fraudulent and collusive sale of the debtor's property to discharge liens upon his homestead; the vendee was not a creditor receiving payment of a debt, and no claim against the homestead was asserted. The opinion expressly excepts from its conclusion a case like the present. 'To make this case,' very justly observes the learned counsel for the respondent in his brief, 'at all like *Riddell v. Shirley*, the plaintiff ought to sue Drew to get the money back which the defendant paid him; but the absurdity of such a proceeding is too apparent to need any comment.'"

Notwithstanding the remarks of the learned judge, the case seems to overrule *Riddell v. Shirley*. See Thompson on Homesteads and Exemptions, sect. 306.

In Illinois it is held not to be a fraud for an insolvent debtor to purchase a homestead, even though he cause the title to be vested in his wife, if he in good faith intended it as a homestead: *Cipperly v. Rhodes*, 53 Ill. 346. BREESSE, C. J., said: "No question is made that the homestead right would have existed in Rhodes, had he taken the deed to the lot in his own name instead of taking it in the name of his wife. He paid the purchase-money wholly out of his own funds, and at a time he had a right to obtain a homestead which would not be liable for his debts then existing, or to be subsequently contracted: and the sole

question is whether taking the deed to his wife placed the property beyond the protection of the homestead law. This is an inquiry into which the *animus* enters largely. Did he purchase it as and for a homestead, and has it been so used and held. If such was his intention, then taking the deed to his wife would not, we think, cut off that right. If the design was simply to acquire property, which he could hold in fraud of his creditors, then the law would strip it of its covering, and subject it to the payment of the debts. But it must be remembered that it was not a fraud on his creditors to buy a homestead which would be beyond their reach."

Following *Randall v. Buffington*, it was held that an insolvent debtor might appropriate land to the use of a homestead even after a judgment was obtained against him, but before it became a lien upon the land: *Culver v. Rogers*, 28 Cal. 520. In *In re Henkel*, 2 Sawyer 307, the United States District Court held that under the law of California an insolvent might apply funds in his possession to the discharge of an encumbrance on his homestead without impairing its inviolability, and that a homestead might be declared at any time before the lien of a judgment had actually attached.

In Nevada, property which possesses the characteristics of a homestead may be selected at any time before actual sale or execution, and the right of such selection is not destroyed by the insolvency of a debtor or the levy of an attachment: *Hawthorne v. Smith*, 3 Nev. 182. See further on this point Thompson on Homesteads and Exemptions 319; *Trotter v. Dobbs*, 38 Miss. 198; *Irwin v. Lewis*, 50 Id. 363; *Letchford v. Cary*, 52 Id. 791; *Stone v. Darnell*, 20 Tex. 11; *Giddings v. Crosby*, 24 Id. 295; *Macmanus v. Campbell*, 37 Id. 267; *North v. Shearn*, 15 Id. 174.

In *Edmondson v. Meacham*, 50 Miss. 34, the rule is stated to be as follows: "A debtor may innocently subtract

from his resources such means as may be reasonably necessary for the support of his family. His creditors, therefore, cannot pursue and reach the money of the husband and father paid for such necessary purposes, as the maintenance of the family and education of the children. But subject to that right, the debtor must devote his property and means to his creditors. If the husband takes money which ought to pay his debts and invests in the purchase of real estate or other

property for wife or children, the transaction may be fraudulent or not, as the husband may be indebted or not, and then by a comparison of his debts with the resources retained by him. If he was insolvent at the time of the purchase, the evidence is overwhelming and conclusive that the motive was to make a gift at the expense of creditors, and that the intent was to withdraw his means from their reach."

CHARLES BURKE ELLIOTT.

Minneapolis.

Supreme Court of Michigan.

LLOYD v. WAYNE CIRCUIT JUDGE.

A statute which provides for the *ante mortem* probate of a will is inoperative and void.

A proceeding authorized by such statute by which questions as to competency, undue influence, &c., can be determined in advance of the testator's death, is not within any recognised judicial power, and the courts cannot be called upon to enforce it.

MANDAMUS.

John H. Bissell, for relator.

The opinion of the court was delivered by

CAMPBELL, J.—In this case Lloyd attempted to have his will established during life in the Probate Court for Wayne county, and an appeal was taken from the Probate to the Circuit Court. In that court the circuit judge was of opinion that the proceeding was extra-judicial, and refused to allow it to go on; but instead of dismissing or quashing it on that ground, entered an order affirming the probate decree. *Mandamus* is now applied to vacate that order.

There can be no doubt of the impropriety of the order of the Circuit Court. By affirming the probate order he asserted jurisdiction, and he had no right to affirm it without a hearing on the merits. But whether he should proceed to such a hearing is the principal question before us. The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living

are unheard of in this country or in England; and inasmuch as the statute only makes the decree-effective in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by change of residence, or to leave the will once rejected open to probate in the usual way after death, the proceeding is still more anomalous. I am disposed to think with the circuit judge, that this is not in any sense a judicial proceeding which he was bound to consider or entertain.

This is the first instance in our jurisprudence in which an attempt has been made to compel a living person, as a condition of relief, to enter upon a contest with those who, until his death, can have no recognition anywhere, and who after his death are presumed to represent him, and not any hostile interest. The maxim that the living can have no heirs is as well settled by statute as by common law. Until a man dies it can never be known who will succeed him, even if intestate; and whatever may be the probability, there is no certainty that a single one of the persons who have come in here to oppose the will may survive the testator. The law gives no preference to contingent expectations, and legally it is just as possible that the state may take by escheat as that the person now litigating, or any other more remote relatives will become interested. It is also within the power of relator to dispose of his entire property, not merely by a new will, but by sale or gift, and in such event there will be nothing for this will to dispose of and possibly nothing for these or any other kindred to inherit. It is also competent for him to go into another county or state or country, either of which acts would put his estate beyond the jurisdiction of Wayne county; and either of the two latter may change the course of inheritance or otherwise affect the disposal of his estate.

I cannot conceive it possible that the proceeding can be dealt with as judicial when the chief party to it will not be precluded by the decree from doing exactly as he might have done had the court never been called on to act at all. This statute, which was probably designed to prevent the unseemly and disgraceful attempts too often made to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with, has been so drawn as to remove none of the difficulties, but rather to make them worse. It is a singular, and in

my judgment a very unfortunate spectacle, to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases.

The practice which has usually prevailed in civil law countries, and also is said to have been customary in various parts of England (see Seld. Ecc. Jur. Test. 5) of having wills executed or declared in solemn form, or acknowledged before reputable officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom, has been approved by the continued experience of most countries, and has saved them from the *post mortem* squabbles and contests on mental condition which have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators. There is no sensible reason why a will which is always revocable and contingent should not be established, presumptively at least, by such an acknowledgment as will suffice to prove a deed which is irrevocable; and where, as is usually the case abroad, such an acknowledgment is made before trustworthy officers, in the presence of known and reputable witnesses, and in the enforced absence of all other persons, the security against incapacity and incompetency is quite as strong as can be found in a contest before a court or jury that never saw the testator. A man's incapacity, if it exists, will not easily escape the notice of his disinterested friends and neighbors, and when they certify to his competency and freedom of action with their attention directly called to their own responsibility in doing so, they are seldom mistaken, and those who seek to impugn their action, if allowed to do it at all, should be compelled to assume the burden and risk themselves. But this is not judicial action.

In the proceedings of various kinds familiar in England, where conveyances are made effective by acknowledgment and enrolment before various classes of public officers and tribunals, it was never deemed proper or necessary to bring general heirs presumptive before the acknowledging officer, in order to give efficacy to transfers in fee simple, either of man or woman, although they are as clearly affected in their prospects of inheritance as they would be by a will. And in the cases where testimony is to be perpetuated for use in

future controversies, the rule is inflexible that no matter how great the probability of inheritance may be, the heir presumptive is not either a competent or permissible party to such litigation; and this is so even in case of estates tail, and although the circumstances are as strong as possible against the chances of any change: *Earl Belfast v. Chichester*, 2 Jac. & W. 439; *Allan v. Allan*, 15 Ves. 130; *Lord Dursley v. Fitzhardinge*, 6 Id. 251; *Sackvill v. Ayleworth*, 1 Vern. 105; *Smith v. Attorney-General*, 6 Ves. 260; s. c., in note 1 P. Wms. 117.

The broadest definition ever given to the judicial power, confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs. Our statutes have never undertaken, and do not in this case undertake to give to the heirs any interest which will ever be fixed by this probate, or which may not be cut off at any time by their own death, or by relator by new will or conveyance. It is by no means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate. There has never been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes, is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of the estates. This rule is so general, that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately. This statute does not attempt to change the place of ultimate probate, and it does not make a decree against the will either a bar or even admissible to prevent future probate after death. It makes no provision for making a finding either way evidence for any purpose during testator's life, so as to negative testamentary capacity, or otherwise to affect him. And it has no force for any purpose so long as he lives.

I am of opinion that the statute is inoperative, as not within any recognised judicial power, and that the courts can not be called

upon to administer it, and that the *mandamus* should vacate the whole proceedings.

SHERWOOD and CHAMPLIN, JJ., concurred.

This case is one of great interest both on account of the novelty and importance of the principles involved. So far as we can learn, the statute in question is new in principle, and the decision thereupon is certainly unique. As the statute, which is published in the Public Acts of Michigan for 1883, on page 17, may not be accessible to all the readers of the Register, and is not given in the opinion, we reproduce it here.

"An act to provide for the establishment of wills during the lifetime of testators.

"Sect. 1. The people of the state of Michigan enact, that to any will heretofore or hereafter executed, the testator may make and annex his petition, to be sworn to before and presented to the judge of probate for the county where the testator resides, asking that such will be admitted and established as his last will and testament.

"Sect. 2. Every such petition shall contain averments that such will was duly executed by the petitioner without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents, and that the testator is of sound mind and memory and full testamentary capacity, and shall state the names and address of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased, and may also contain the names and addresses of any other persons whom such testator may desire to make parties to such proceedings.

"Sect. 3. Such judge of probate shall thereupon, upon request of such testator, appoint a time for the hearing of such petition, and issue citations to the parties named in such petition, and direct pub-

lished notice of such hearing, and have such hearing, after proof of service of citations and of publication of notice, in the manner, as near as practicable, as is required for the probate of wills.

"Sect. 4. If any person named in such petition shall be a minor, or otherwise under disability, a guardian *ad litem* shall be appointed by such judge to represent such person. On such hearing such judge of probate shall examine into the matters alleged in such petition, and into the testamentary capacity of such testator, and examine witnesses in relation thereto, and if it shall appear that the allegations of such petition are true, and that said testator was of sound mind and memory and full testamentary capacity, such judge shall make a decree thereon, and shall cause a copy of such decree to be attached to said will, certified under the seal of said court, decreeing that the testator, at the making of such will and such petition, was possessed of sound mind and memory, and full testamentary capacity, and that said will was executed without fear, fraud, impartiality or undue influence, which decree shall have the same effect as if made by said court after the death of the testator on the probate of such will, and such will having been so established shall not be set aside or impeached on the grounds of insanity or want of testamentary capacity on the part of the testator, or that the same was executed through fear, fraud, impartiality, or undue influence.

"Sect. 5. Appeals shall be in the same manner as from probate of wills.

"Sect. 6. Nothing in this act contained shall be construed to prevent the revocation of such will, or alteration or other change thereof, as in ordinary wills." Approved April 11th 1883.

The great learning and experience of

Judge CAMPBELL, who delivered the opinion of the court in this case, would certainly lead one to consider well any opinion he might express adverse to the conclusion arrived at.

The question seems to us to be one of considerable difficulty. In the absence of the briefs of counsel we have ransacked the books for some broader and more satisfactory definition of *judicial* power than that given by the learned judge, but without success. We confess to a desire to find some reasonable ground for criticising the conclusion arrived at, for if the unseemly contests respecting the testamentary capacity of testators can be legally prevented, it is a consummation devoutly to be wished. Judge CAMPBELL says: "The broadest definition ever given to judicial power confines it to *controversies between conflicting parties in interest*, and such can never be the condition of a living man and his possible heirs." The italics are our own.

"The difference between the departments [of government] undoubtedly is, the legislative makes, the executive executes, and the judiciary construes, the law:" Per MARSHALL, C. J., in *Wayman v. Southard*, 10 Wheat. 46; per GIBSON, C. J., in *Greenough v. Greenough*, 11 Penn. St. 494.

That which distinguishes a judicial from a legislative act is, that one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions: *Bates v. Kimball*, 2 Chip. 77.

To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department: *Cincinnati, &c., Rd. Co. v. Commissioners, &c.*, 1 Ohio St. 81; *Cooley Const. Lim.* *91.

"The former [judicial tribunals] de-

cide upon the legality of claims and conduct, and the latter [legislative tribunals] make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore,—to compare the claims of parties with the laws of the land before established,—is in its nature a judicial act. * * * It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the state:" WOODBURY, J., in *Merrill v. Sherburne*, 1 N. H. 204. See, also, generally, *Cooley Const. Lim.* *90-92.

In all the above definitions, when not expressly so stated, it is assumed that there is a controversy between parties in interest, upon which the court is called to act.

The law of parties to action at law and in chancery, and the well-known rule that a court will not pass upon a mere moot case or one in which there is no real controversy, are also additional evidence of the correctness of the decision in the principal case. Under our system, unlike the Roman civil law, there is no other method of growth of judge-made law except upon actual cases arising between parties in interest. The fact that in a few states by constitutional enactment the legislative or executive departments have been empowered to require the opinion of the Supreme Court "upon important questions of law, and upon solemn occasions," in advance of actual litigation, would seem to lend additional force to the definitions above quoted. See *Cooley's Const. Lim.* *40.

Upon the whole, Judge CAMPBELL, in the clause above quoted, seems to have struck the key-note of the question, and to have arrived at the true conclusion. However desirable it may be to have a

tribunal for the settlement of various interesting questions between parties not legally interested under our present constitutions, such questions must be relegated to lyceums and debating schools; for if once the principle of the statute in question is conceded to be correct, there is no limit whatever to the number and kind of questions that may be propounded to our courts for discussion, and our courts might easily become moot courts to which all sorts of questions as well as controversies might be brought.

The end sought by the statute is, however, a meritorious one, which might be accomplished by some such system of acknowledgment and record as is applicable to deeds of conveyance. It would be easy to prepare such an act, and it is to be hoped that although the present statute cannot be enforced, it has subserved a useful purpose in drawing attention to a subject than which there are few more important.

MARSHALL D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME JUDICIAL COURT OF MAINE.¹

COURT OF ERRORS AND APPEALS OF MARYLAND.²

SUPREME COURT OF OHIO.³

SUPREME COURT OF RHODE ISLAND.⁴

ACKNOWLEDGMENT.

By Married Woman—Sufficiency of.—Under a statute which provided that in every case of a deed executed by husband and wife to convey the wife's realty, "the wife acknowledging such deed or instrument shall be examined privily and apart from her husband, and shall declare to the officer taking such acknowledgment that the deed or instrument shown and explained to her by such magistrate is her voluntary act, and that she doth not wish to retract the same," an acknowledgment was certified to as follows by the magistrate who took it: "Personally appeared S. A. J. and A. J., wife of said S. A. J., to the within and foregoing written instrument and severally acknowledged the same to be their free and voluntary act and deed, hand and seal, the said A. J. having acknowledged separate and apart from the said husband as the law directs, and that they did not wish to retract the same:" *Held*, that the acknowledgment was fatally defective: *Held, further*, that the statutory provision requiring the deed to be "shown and explained" to the married woman was mandatory, and that the omission from the magistrate's certificate of a statement that the deed had been "shown and explained" to the married woman was fatal: *Paine v. Baker*, 15 R. I.

BILLS OF LADING.

Cotton Shipped by Mistake to wrong Person—Bona Fide Purchaser.—Z. & Sons, and S., L., K. & Co., of Baltimore, employed the firm of

¹ From J. W. Spaulding, Esq., Reporter; to appear in 77 Me. Rep.

² From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

³ From George B. Okey, Esq., Reporter; to appear in 43 Ohio St. Rep.

⁴ From Arnold Green, Esq., Reporter; to appear in 15 R. I. Rep.

G. Bros., as a common agent for the sale of fertilizers in the state of Georgia. The fertilizers were sold on credit, and payment was secured by cotton notes of the purchasers, payable to G. Bros., agent for Z. & Sons, or agent for S., L., K. & Co., as the case might be. The cotton notes were for a certain sum of money, with the privilege to the makers of redeeming them at maturity in cotton of a specified quality, and at an agreed price. When sales were made, G. Bros., forwarded the purchasers' notes to their principals in Baltimore, and when the notes matured, they were returned to G. Bros., for collection. Some thirty-two bales of cotton received in payment of the fertilizers of Z. & Sons, were shipped through the mistake of G. Bros., to S., L., K. & Co., and the bills of lading were also delivered to them; they sold the cotton and applied the proceeds to the payment of an indebtedness of G. Bros. to them. Subsequently G. Bros., discovering their mistake, sent to Z. & Sons an order on S., L., K. & Co. for the cotton. Demand having been made, and delivery refused, Z. & Sons sued S., L., K. & Co. in trover for the conversion of the cotton. The defendants claimed that they were *bona fide* holders of the bills of lading for value, and that they thereby acquired under the Act of 1876, ch. 262, a perfect title to the cotton, not only as against G. Bros., but also as against the plaintiffs, the actual owners: *Held*, that the plaintiffs not only had a right of property in the cotton, but a right to its immediate possession, and were entitled to bring their action of trover to recover damages for its conversion: *Seal v. Zell*, 63 Md.

CONSTITUTIONAL LAW.

Municipal Assessment—New Culvert—Under an ordinance for that purpose, the city of Cleveland improved Kinsman street, between certain points, by grading, draining and paving the same. This improvement included the construction of a culvert for drainage, and the cost of the improvement, which included the cost of the culvert, was assessed upon the lots bounding and abutting thereon. After it was completed, and the assessment was made, the culvert broke down and became useless for the use intended. The city then by another ordinance provided for the construction of a new culvert at another point on the street, in place of the old one, the cost of which to be assessed upon property bounding and abutting on Kinsman street, within the termini of the original improvement, and which had been assessed therefor, but not bounding or abutting upon the culvert: *Held*, that this additional assessment for the cost of the new culvert was not authorized by law. *Spangler v. Cleveland*, 35 Ohio St. 469, approved and followed: *Waterson v. Bradley*, 43 Ohio St.

CRIMINAL LAW.

Juror—Questions to.—At the trial of one indicted for keeping a liquor nuisance the presiding justice commits no error in refusing to allow a juror to be asked on his *voire dire* whether he has contributed money for the prosecution of persons generally who are charged with keeping such nuisances: *State v. Hoxsie*, 15 R. I.

DAMAGES.

Trespass for unauthorized use of Land by Railroad.—An action of trespass was brought against a railroad for running cars over ground, the

title to which, owing to a failure to comply with certain statutory requirements, never vested in the railroad : *Held*, that plaintiff should be confined to the damages caused by the acts of the defendant in running the cars over the ground, and that plaintiffs were not entitled to recover in this action either compensation for the use of the tracks or the value of the land taken or exemplary damages : *Balt. & Ohio Railroad v. Boyd*, 63 Md.

DEED. See *Acknowledgment*.

EJECTMENT.

Title—Possession—Undivided Interest.—Where land is forfeited to the state for the non-payment of taxes assessed upon it, and the state fails to convey the title to a purchaser for the reason of illegality in its proceedings of sale, the original owner has a better claim of title to the land than the purchaser has, and he may maintain an action against the purchaser therefor : *Chandler v. Wilson*, 77 Me.

A person having for over twenty years a recorded deed of a township of mainly wild land, during the time lumbering on some portions of it and cultivating other portions, does not thereby divest the true owner of his title of certain lots within the township, such lots not having been occupied during that period of time : *Id*.

A person who obtains the title of three of the five heirs of an owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although the latter person does not occupy under the other heirs ; the demandant has no seisin of more than three-fifths of the land : *Id*.

EQUITY.

Reformation—Character of Proof required—Lapse of Time.—Where a person seeks to reform an instrument upon the ground of mistake, he must not only show clearly and beyond doubt that there has been a mistake, but he must also be able to show with equal clearness and certainty the exact and precise form and import that the instrument ought to be made to assume, in order that it may express and effectuate what was really intended by the parties. And the alleged intention of the parties to which it is sought to make the instrument conform, must be shown to have continued in their minds concurrently down to the time of the execution of the instrument : *Keedy v. Nally*, 63 Md.

The application for relief on the ground of mistake should be made with due diligence, and time runs from the discovery of the mistake : *Id*.

An agreement in writing between S. and N. was made in the year 1862. S. died in the year 1883, and one of the witnesses to the agreement also died. In the year 1884, N. filed a bill against the executor of S., to have the agreement reformed on the ground of mistake. It was not pretended that N. was ignorant of what was written in the agreement, or that he could not have been informed of it by the use of due diligence. The agreement was at all times accessible to him, and he procured its production for the examination of his counsel in respect to a litigation between himself and the son of S. sometime before the death of either S. or the deceased subscribing witness : *Held*, that the complainants' application was barred by the great lapse of time from the date of the agreement to the time of filing the bill : *Id*.

EVIDENCE. See *Negligence*.

Expert—Who is such—Insanity.—Whether a physician, called in a case, is qualified to testify as an expert upon questions of insanity, is a question of fact for the presiding judge to decide, and his decision is usually final. In extreme cases where a serious mistake has been committed, through some accident, inadvertence or misconception, his action may be reviewed : *Fayette v. Chesterville*, 77 Me.

Skilful and reputable physicians, although not experts upon the subject, may testify to the mental condition of their patients when they have adequate opportunity of observing and judging of their mental qualities. But this does not embrace a case where a single examination was made by a physician to qualify himself as a witness in a pending litigation : *Id.*

EXECUTION. See *Pension*.

EXECUTOR AND ADMINISTRATOR.

Right to Property—Fraudulent Conveyance by Testator.—An administrator cannot in Rhode Island maintain proceedings to recover property conveyed away by the deceased, though the conveyances may have been in fraud of creditors and the property may be needed to pay the debts of the estate of the deceased : *Estes v. Howland*, 15 R. I.

In such case the defrauded creditors are the proper parties to act : *Id.*

An administrator is, however, the proper party to act, in order to recover sufficient property to defray the expenses of administration if the assets in his hands are not sufficient for this purpose : *Id.*

When a bill in equity was brought by an administrator to set aside as fraudulent against creditors conveyances made by the deceased, and it did not appear whether the administrator held sufficient assets to pay the expenses of administration : *Held*, that the bill instead of being dismissed might, if the administrator lacked funds to defray the expenses of administration, be amended by setting forth this fact and by adding the creditors or some of them suing for themselves and the others : *Id.*

EXPERT. See *Evidence*.

FORMER RECOVERY.

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HIGHWAY. See *Negligence*.

HUSBAND AND WIFE. See *Acknowledgment*; *Limitations*, *Statute of*.

INJUNCTION. See *Way*.

INSANITY. See *Evidence*.

INSOLVENCY. See *Lis Pendens*.

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Settlement on Wife and Children—Revocation of.—F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out M. was his wife, and he had four children living by a former wife. Subsequently a child was born to F. and M. Afterwards F. and M. transferred their right, title and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer. On a bill of interpleader brought by the insuring company after the deaths of F. and M.: *Held*, that the policy was an executed, irrevocable, voluntary settlement in favor of the wife and the children in being when it was taken out: *Held, further*, that F. and M. could pledge or assign the policy to the extent of their interests in it: *Held, further*, the policy being for \$5000, that one-fifth of this amount was due to the creditor and one-fifth to each of the four children: *Held, further*, one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin: *Conn. Mut. Life Ins. Co. v. Baldwin*, 15 R. I.

Separate Policies in different Companies—Several Liability—Election to Rebuild—Separate Compromise—Measure of Liability—A policy of insurance on a building against loss or damage by fire, reserved to the insurer the right to repair or rebuild upon giving notice of such intention within ninety days after proof of loss. After such proof the insurer served notice of its intention to rebuild, "acting jointly with other insurance companies claiming to be interested." At the time of the fire and of this notice, there were ten separate policies, in as many different companies, upon the same building; eight of which served like notices, severally signed by the company serving them. Before the time expired to rebuild, but while these insurers were taking steps for that purpose, the plaintiff compromised and settled with all said companies so electing to rebuild, except defendant, and released each of them from all liability, receiving for such release an amount of money in the aggregate much less than the amount of these policies. The defendant's policy had this condition: "In no case shall the claim be for a greater sum than the actual damages to or cash value of the property at the time of the fire; nor shall the assured be entitled to recover of this company in a greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general, or floating policies, and without reference to the solvency or liability of other insurance." *Held*: 1. That the liability of the defendant was several and not joint and that the service

by defendant of its intention to rebuild, acting jointly with the other companies, converted the respective policies from contracts for a money indemnity into contracts of indemnity payable in repairing or rebuilding, to be performed in the time named in the policy, but if no time is specified then within a reasonable time. 2. That the service of the notices did not operate to change the terms of this policy. Hence the plaintiff may recover on this policy, such share of the whole damages as the sum insured bears to the whole amount insured without reference to the solvency or liability of other insurance. 3. That after the policy has been thus converted into a building contract, the insured might settle and compromise with any of the companies thus bound to rebuild without releasing the others from such proportionate share of such loss as their policies bore to the aggregate insurance. 4. That in ascertaining defendant's proportionate share of the entire loss reference must be had to the aggregate insurance without regard to the fact that some of the companies had been settled with for a less sum than they were liable for, or that others did not elect to rebuild, or were insolvent or not liable: *Good v. Buckeye Mut. Fire Ins. Co.*, 43 Ohio St.

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ject to the doctrine of *lis pendens*, and that the petition of the receiver should be granted: *Petition of Frank S. Arnold*, 15 R. I.

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MECHANIC'S LIEN.

Statutory Requirements.—A mechanic's lien exists, and is operative by virtue of statutory law only, and unless the substantial requirements of the law are observed, the claimant is beyond the scope of the remedy. While the courts are always prepared to construe the law liberally, and as remedial in its nature, and to allow all proper and necessary amendments to be made, yet all the proceedings must be in substantial accord with the main requirements of the statute: *Kenly v. Sisters of Charity*, 63 Md.

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Failure to Record—Right of subsequent Purchaser—Interest of Mortgagor who Sells and Receives Purchase-Money Mortgage.—The mortgagor in an unrecorded mortgage, who sells and conveys the mortgaged property, and concurrently takes back a mortgage from the purchaser to secure the purchase-money, retains such an interest in the property as may be taken in equity and applied on the debt secured by the unrecorded mortgage: *Home Building and Loan Association v. Clark*, 43 Ohio St.

The purchaser from the mortgagor of lands encumbered by an unrecorded mortgage, takes title thereto free from such encumbrance, even if he has full knowledge and notice of its existence, and that it is unpaid at the date of his purchase: *Id.*

If a judgment creditor procures a judgment against such a purchaser after such unrecorded mortgage has been recorded, his lien thereunder is valid as against such mortgage, and upon a judicial sale of the mortgaged property the proceeds of sale will be applied to pay such judgment lien, in preference to the mortgage which was not recorded at the date of such purchase: *Id.*

Foreclosure by Senior Mortgagee—Rights of Junior Mortgagee.—Where a senior mortgagee forecloses his mortgage, and sells the property, without making a junior mortgagee a party, or giving him notice, the purchaser, at such judicial sale, whether it be the senior mortgagee or a stranger, acquires his title subject to the right of redemption by the junior mortgagee, and the same rule applies where the junior mortgagee has assigned all his interest in the mortgage, and the notes secured thereby to a third person, who is not a party and is without notice of such proceedings and sale: *Holliger v. Bates*, 43 Ohio St.

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In such a case the natural instinct for self-preservation does not afford proof of the absence of contributory negligence on the part of the traveller. It may give character or force to facts already proved, but it does not of itself add or create proof : *Id.*

Town—Highway—Want of Repair—Contributory Negligence.—A town is not required to render a way passable for the entire width of the whole located limits : *Morse v. Inhabitants of Belfast*, 77 Me.

In determining the question whether a way is safe and convenient within the meaning of the statute, it is enough that the way is safe and convenient in view of such casualties as might reasonably be expected to happen to travellers : *Id.*

The law has not prescribed what imperfections in a way will be considered as constituting a defect or want of repair, so as to render a town liable if an injury is occasioned thereby. These are questions of fact, generally, for the jury to settle, under proper instructions : *Id.*

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Exemption from Execution.—By the statutes of the United States, the money due a pensioner is exempted from attachment or seizure upon legal process while it remains with the pension office or any officer or agent thereof, or is in course of transmission from such officer or agent to the pensioner, but not after the money has come to the pensioner's hands; when the money is actually in the possession of the pensioner the protection ceases: *Friend v. Garcelon*, 77 Me.

Pledge—Attachment.—One who loans money to a pension claimant to enable him to establish his claim, and to be repaid when the pension money is received, is not debarred from recovering back his loan by U. S. R. S., sect. 5485: *Crane v. Inhab. of Linneus*, 77 Me.

A verbal promise by a pension claimant, to pay a debt, when he receives his pension, or out of his pension, is not such a pledge, mortgage, assignment, transfer, or sale of the pension claim, as is forbidden by U. S. R. S., sect. 4745: *Id.*

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REFORMATION. See *Equity.*

SPECIFIC PERFORMANCE.

Parol Contract for Land.—A parol agreement for the conveyance of land may be enforced in equity in behalf of the vendee whose partial performance has been such that fraud would result to him unless the vendor be compelled to perform on his part: *Woodbury v. Gardner*, 77 Me.

Thus, where the vendee, with the assent of the vendor, took open, actual possession of the premises in pursuance of the agreement, made permanent erections thereon, promptly paid the taxes assessed thereon to him by direction of the vendor and substantially performed his agreement, specific performance was decreed against the vendor's sole devise: *Id.*

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Instruction to Jury—Personal Knowledge.—An instruction which authorizes a jury, in determining an issue presented to them, to infer what was the fact from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," is erroneous: *Douglas v. Trask*, 77 Me.

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Railroad—License—Revocation—Injunction.—A railway company which has entered upon land under a license from the owner, and constructed its road, cannot plead such license as a defence to an action of trespass *quare clausum fregit*, for running its trains over said land, brought by the owner thereof: *Baltimore & Hanover Rd. Co. v. Algire*, 63 Md.

A right of way is such an interest in land as cannot be acquired by a mere license. It can only be acquired in this state in the mode provided by the statute, that is, by deed duly executed and recorded: *Id.*

Where a railway company has the right under its charter to acquire a right of way over certain land by condemnation, and proceedings for such purpose are dispensed with by reason of the consent of the owner of the land to the construction of the road, and he subsequently, after the road has been built at large expense, revokes his consent, a court of equity will restrain him from interfering with the railway company in the use and enjoyment of the right of way pending proceedings to have the same condemned: *Id.*

Public Way—Dedication—Use—Right of Owner of Soil.—The existence of a public way may be established by evidence of an uninterrupted user by the public for twenty years; the presumption being that such long-continued use and enjoyment by the public of such way had a legal rather than an illegal origin: *Thomas v. Ford*, 63 Md.

At the common law, however, the principle of presumptive dedication, or *quasi* prescription, does not apply to give rise to a right in the general public to use the land of an individual on a navigable river, as a public landing, and place of deposit of wood and other articles of property for an indefinite time: *Id.*

The existence of an ordinary highway over the land of an owner, whether it had its origin by condemnation, dedication or prescription, does not divest him of the property in the soil. In such case he has full dominion and control over the land, subject to the easement in the public, and he may recover it in ejectment, or bring an action for trespass against any person who deposits wood, stones or rubbish upon the soil, or otherwise infringes upon the ordinary proprietary rights of the owner of the soil, in a manner not in the use of the easement as a highway: *Id.*

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Attestation.—Under a statute requiring that a will shall be attested and subscribed in the presence of the testator the witness must actually sign in the testator's presence; acknowledgment in the presence of the testator of the witness's signature affixed in the testator's absence, is a nullity: *Town of Pawtucket v. Ballou*, 15 R. I.

Devise—Lapse—Gift of Residue.—Residuary testamentary disposition as follows: "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wherever and however situate, of which I am now possessed, or may die seised or possessed, unto my sons S., T., B., H., J. and C., to have and to hold the same with all the privileges and appurtenances to the same belonging, to them

the said S., T., B., H., J. and C., their heirs and assigns forever." *Held*, the devisees being individually named and nothing in the will or in the testator's circumstances indicating a different intent, that the devisees took as individuals not as a class: *Church v. Church*, 15 R. I.

One of these sons died without issue before the testator: *Held*, that the deceased son's share lapsed, and at the testator's death descended to his heirs as intestate estate: *Id.*

A general residuary devise or bequest carries lapsed or void devises or bequests, but does not include any gift which fails, of the residue itself: *Id.*

LIST OF THE PRINCIPAL NEW LAW BOOKS.

ABBOTT.—A Brief for the Trial of Civil Issues before a Jury. By **AUSTIN ABBOTT**. 8vo., pp. 201. New York: Diossy & Co.

BEACH.—A Treatise on the Law of Contributory Negligence. By **C. F. BEACH, Jr.** 8vo., pp. 512. New York: Baker, Voorhis & Co.

BOONE.—Pleading under the Codes. Adapted to use in the several States and Territories which have adopted the System of Reformed Procedure, and in all the Courts where that System prevails. By **CHARLES T. BOONE**. 12mo., pp. 581. San Francisco: Sumner, Whitney & Co.

BROWNE.—A Treatise on the Law of Trade-Marks and Analogous Subjects (Firm-Names, Business-Signs, Good-Will, Labels, &c.). By **W. H. BROWNE**. 2d ed. Revised and Enlarged. 8vo., pp. 737. Boston: Little, Brown & Co.

CAVANAGH.—The Law of Money Securities. In Four Books. I. Personal Securities. II. Securities on Property. III. Money Market and Stock Exchange Securities. IV. Miscellaneous. By **C. CAVANAGH**. 2d ed. 8vo., pp. 805. London: Wm. Clowes & Sons, Limited.

CHAMBERLAIN.—The doctrine of *Stare Decisis*; its Reasons and its Extent. Prize Essay of the New York State Bar Association, awarded January 10th 1885. By **D. H. CHAMBERLAIN**. 8vo., pp. 31.

MACARTHUR.—Reports of Cases arising upon Applications for Letters-Patent for Inventions, determined in the Circuit and Supreme Courts of the District of Columbia, on appeal from the Commissioner of Patents, and a Table of the Patents directly involved therein, together with References to the Cases where these Patents have been subsequently Litigated, and Construed, Sustained or held Invalid. By **FRANK MACARTHUR**. Vol. 1. 8vo., pp. 788. Washington: W. H. Morrison.

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WASHBURN.—A Treatise on the American Law of Easements and Servitudes. By **EMORY WASHBURN**. 4th ed., Revised and Enlarged, by **SIMON GREENLEAF CROSWELL**. 8vo., pp. 829. Boston: Little, Brown & Co.

WOOD.—A Treatise on the Law of Railroads. By **H. G. WOOD**. 3 vols. 8vo., pp. 1953. Boston: Chas. C. Soule.

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ARBITRATION.

1. Even if language of submission be broad enough to cover claim, which it clearly appears was not before arbitrators, award will not bar it. *Lee v. Dolan*, 413.

2. Upon disagreement of the two arbitrators to whom controversy was submitted, and selection by them of third arbitrator under agreement of reference, an award made by two of the arbitrators, without giving party against whom it is rendered an opportunity of being heard, is void. *Alexander v. Cunningham*, 413.

ARREST. See **MALICIOUS PROSECUTION**, 3-6.

ASSAULT. See **CRIMINAL LAW**, II. **DAMAGES**, 1, 2, 5.

ASSIGNMENT. See **ATTACHMENT**, 3, 4. **ATTORNEY**, 1. **BILLS AND NOTES**, 1, 10. **CONFLICT OF LAWS**, 2. **DEBTOR AND CREDITOR**, 1. **EXECUTION**, 4. **INSURANCE**, 1, 11, 12, 19, 21. **LIS PENDENS**. **REMOVAL OF CAUSES**, 4. **TORT**, 5, 6.

1. Assignee of cause of action against railroad company arising under 43d sect. Missouri Railroad Law, for double damages for killing of live stock, cannot sue. *Snyder v. Wabash, &c., Co.*, 209.

2. Future wages to be earned under present contract, indefinite as to time and amount, may be assigned. *Wade v. Bessey*, 139.

3. Mortgages invalid against creditors of mortgagor are invalid against his assignee for their benefit. *Blandy v. Hull*, 256, and *note*.

4. Lien of such mortgage is not preserved by clause in assignment excepting from its operation all existing liens, and providing that such liens shall not be affected thereby. *Id.*

5. Where statute requires entry, on chattel mortgage, of certain statement, defect in such statement cannot be cured by conditions contained in mortgage but not referred to in statement. *Id.*

6. Voluntary assignment for benefit of creditors of personal property, wherever situated, passes it to assignee, at time of assignment, and will prevail over subsequent lienors, provided it is not in conflict with some positive or customary law of state where property may be located. *Asken v. Bank*, 399, and *note*. See *infra*, 9.

7. Agent appointed by owner to sell coal lands upon commission, employed another to aid him in effecting sale, promising to give latter, as was claimed, half commissions. Sale having been effected, *held*, on review of evidence, there was no equitable assignment of half of claim for commissions. *Wynnan v. Snyder*, 479.

8. Burden of proof is upon party who claims equitable assignment of one-half of demand. *Id.*

9. Assignment for benefit of creditors executed in another state by debtor domiciled there, which provides that certain creditors shall be paid in full before others receive anything, and which is assented to by creditors holding claims exceeding in amount value of assigned property, if valid by laws of that state, will be upheld in Massachusetts as against attaching creditor of assignor domiciled there. *Train v. Kendall*, 269. See *ante*, 6.

ASSIGNMENT.

10. Where party conveyed all his estate to trustee for sale and collection for benefit of maker, trustee to be paid commission, and afterwards executed and delivered to another person an assignment of bond and mortgage, and delivered bond and mortgage to assignee, and there was no proof that trustee ever had possession of same, *held*, assignee had beneficial title. *Wellington v. Heermans*, 139.

11. Unrecorded mortgage of personalty, which was made and received in good faith, but under which no possession was taken, there being no collusion between the parties nor design to give mortgagor fictitious credit, is good against assignment for benefit of creditors, and the creditors can only claim under the assignment. *Wilson v. Esten*, 413.

ASSUMPSIT. See ACTION, 11, 12. BAILMENT, 4. FORMER RECOVERY, 3. FRAUDS, STATUTE OF, 11. OFFICER, 1, 2.

ATTACHMENT. See ASSIGNMENT, 9. HUSBAND AND WIFE, 15. MORTGAGE, 13.

1. "Residence" in attachment laws not equivalent to domicile. Difference between the two. *Krone v. Cooper*, 269.

2. Property purchased by agent in his own name for undisclosed principal, cannot be seized for debt of agent unless his creditor has been misled by appearances or conduct of parties. *Reed v. McIlroy*, 618.

3. After debtor to defendant in attachment had been garnished by creditor of defendant, he assigned his claim to another creditor, and notice of transfer was given to debtor, when a second creditor in attachment against same defendant garnished same debtor, and both suits proceeded to judgment at same term. Funds in hands of garnishee were not sufficient to satisfy the two judgments: *Held*, that the same should be apportioned between the two judgment creditors to exclusion of assignee of debt. *Reeve v. Smith*, 743.

4. Chose in action is not assignable, at common law or under Illinois statute, so as to vest legal title in assignee. Such assignee will take same subject to all defences. *Id.*

5. GARNISHMENT, 625.

ATTORNEY. See EVIDENCE, 6. HUSBAND AND WIFE, 4, 5. INFANT, 7. MALICIOUS PROSECUTION, 8. PARTNERSHIP, 9. TRIAL, 6.

1. Not liable to subsequent assignee of mortgage for loss by reason of error in certificate of title given to mortgagee. *Dundee Mortgage Co. v. Hughes*, 197, and *note*.

2. Under statute authorizing assignment of counsel to indigent suitors, complainant was assigned to assist defendant in suit to recover from insurance company amount of policy on her husband's life; he thereupon made agreement with her for contingent fee of half amount recovered upon recovery of principal and interest; *held*, that he was entitled to half of both. *Hassell v. Van Houten*, 414.

3. Where two parties go together to attorney, and make statements to him in presence of each other, such statements are not confidential communications. *Lynn v. Lyerle*, 743.

4. Attorney who places his name under words "From the office of," on back of writ in favor of resident of another state, is liable, as endorser, for costs; although in so doing, he violated rule of court. *Morrill v. Lamson*, 540.

5. Requires special authority to release judgment which has not been paid or satisfied. *Rounsaville v. Hazen*, 269.

AWARD. See ARBITRATION.

BAGGAGE. See COMMON CARRIER, 2, 4-6.

BAILMENT. See BANKRUPTCY. CONTRACT, 5. SALE, 2, 3.

1. Where goods have been shipped to one who has not ordered them, title does not pass to consignee by delivery to carrier. *Ruhl v. Corner*, 743.

2. If factor have claims for advances against his principal, and it is expressly agreed that goods shall be shipped to factor to pay those advances, law makes delivery to carrier delivery to factor. *Id.*

BAILMENT.

3. If factor receives consignment of goods for sale, while goods are still property of consignor, lien of factor for previous advances will at once attach. *Id.*

4. But if, while goods are *in transitu* and at his risk, consignor parts with title, goods are no longer his, and lien of his factor will not attach, although the goods actually come into his possession. In such a case where the transferee of the title brought assumpsit instead of trover against the factor, he was only allowed to recover for the money received from sale of goods. *Id.*

5. If mortgagor in possession of personal property stores it with third person, who has no actual notice of the mortgage, which is recorded, the mortgagee who afterwards is informed of the sharing, and expresses no disapproval, is not liable to such person for storage charges, although the storage is necessary, but may maintain action against him for its conversion. *Storms v. Smith*, 209.

BANK. See CHECK. CORPORATION, 26. NATIONAL BANK, 1.

1. Savings bank has no general lien upon surplus proceeds of stock, held as collateral for payment of note. *Brown v. New Bedford Ins.*, 209.

2. S. S. deposited sum of money in bank and received certificate of deposit to the order of himself, or of E. S. (his wife). S. S. died. After his death E. S. presented certificate and drew deposit. *Held*, that certificate did not authorize payment of money to her after death of S. S., and that notice to paying-teller of death of S. S. was notice to bank. *Bank v. Wrightson*, 540.

3. The bank filed bill in equity to enjoin prosecution of action at law against it for the money deposited by S. S., brought by his executor; and to have certificate reformed. Evidence failed to establish case for reformation of certificate; but it was developed in proof, that part of money drawn by E. S., went directly to payment of debts and funeral expenses of S. S. *Held*, that court below committed no error in retaining bill, and under prayer for general relief, allowing bank credit for the money that went directly to pay debts and funeral charges of S. S., and for which executor had obtained credit in his administration account. *Id.*

4. Pittsburgh bank sent to New York bank, for collection, eleven unaccepted drafts, dated at various times through period of over three months, and payable four months after date. They were drawn on "Walter M. Conger, Secretary Newark Tea Tray Co., Newark, N. J.," and were sent to New York bank as drafts on company. New York bank sent them, for collection, to Newark bank, and, in its letters of transmission, recognised them as drafts on company. Newark bank took acceptances from Conger, individually, on his refusal to accept as secretary; but no notice of that fact was given to Pittsburgh bank until after maturity of first draft. At that time drawers and endorser had become insolvent, drawers having been in good credit when Pittsburgh bank discounted drafts. *Held*, that New York bank was liable to Pittsburgh bank for such damages as it had sustained by negligence of Newark bank. *Bank v. Bank*, 139.

BANKRUPTCY. See DEBTOR AND CREDITOR, 5.

Plaintiffs, as an accommodation to themselves, gave order to defendant directing their debtor to pay him what was due them. He collected and used the money by mingling it with his own; and in a few days afterwards was adjudged a bankrupt. After his discharge, in action to recover money, court below found that there was no evidence tending to show fraudulent intent. Jury found that when order was given, plaintiffs told defendant "to keep and use the money until they called for it." *Held*, that defendant's duty was that of bailee without hire; that his use of the money was a conversion of it; that debt was "created by fraud," and not discharged. *Hammond v. Noble*, 619.

BASTARDY. See CRIMINAL LAW, III. DESCENT, 1.**BENEFICIAL SOCIETY.** See INSURANCE, 18, 20.**BIBLE.** See SCHOOL, 1, 2.**BILL OF LADING.** See COMMON CARRIER, 9.

G. Bros., common agents for sale of fertilizers of Z. & Sons and S., L., K. & Co., shipped through mistake cotton received in payment of fertilizers of Z.

BILL OF LADING.

& Sons, to S., L., K. & Co., and the bills of lading were also delivered to them; they sold the cotton and applied proceeds to payment of indebtedness of G. Bros. to them. Subsequently, G. Bros. discovering their mistake, sent to Z. & Sons an order on S., L., K. & Co. for the cotton. Demand having been made and delivery refused, *Held*, that plaintiffs could maintain trover for cotton, notwithstanding Maryland Act of 1876, ch. 262. *Seal v. Zell*, 796.

BILLS AND NOTES. AGENT, 1, 2. APPORTIONMENT. BANK, 4. CONTRACT, 4. DURESS, 2. EVIDENCE, 14, 15. EXECUTORS AND ADMINISTRATORS, 2, 3. INTEREST. SET-OFF, 3. SUBROGATION, 1.

I. Form.

1. Though draft contains direction to charge sum drawn for to certain account, it is still a negotiable bill of exchange, not payable out of a particular fund, and does not constitute an assignment of the fund. *Whitney v. Bank*, 270.

2. Note containing clause, "the drawers and endorsers * * * expressly agree that the payee or his assignees may extend the time of payment thereof from time to time, indefinitely, as he or they may see fit," is non-negotiable. *Glidden v. Henry*, 716, and note.

3. Note in ordinary form, given by corporation, had on it when produced in court a paper seal. No vote of corporation authorized the seal; note did not purport to be under seal; seal was not corporate seal, and treasurer of corporation did not admit putting it on note. *Held*, that seal must be disregarded as "mere excess." *Mackay v. Church*, 680.

II. Rights of parties.

4. Material alteration of note avoids same as to maker not consenting even in hands of *bona fide* holder. *Horn v. Bank*, 72.

5. Substituting another payee for original payee, with knowledge and consent of but one of two makers, releases the other. *Id.*

6. Note not avoided as to maker by material alteration made in accordance with, but some time after, agreement between maker and payee, and without knowledge of maker. *Wardlow v. List*, 209.

7. Addition of signature of surety to promissory note, without consent of maker, does not discharge him. *Mersman v. Verges*, 72.

8. Mortgage of husband and wife of her land, for accommodation of partnership of which husband is member, and as security for note made by husband to partner, and endorsed by partner for same purpose, and to which note partner, before negotiating it, adds wife's name as maker, without consent or knowledge of herself or her husband, is not thereby avoided as against one who, in ignorance of alteration of note, lends money to partnership upon security of note and mortgage. *Id.*

III. Endorsement.

9. Where holder and owner of two notes endorsed in blank, one over-due and other not, gave them to agent to receive payment only, and agent sold them to innocent person without notice, *held*, that title only passed to note not due. *Towner v. McClelland*, 140.

10. That assignee takes note secured by mortgage by assignment before maturity, free from all defences at law, does not protect mortgage against equitable defences. *Id.*

BOND. See EQUITY, 13. **NEGOTIABLE INSTRUMENT,** 1. OFFICER, 3. REMOVAL OF CAUSES, 6.

BRIDGES. See HIGHWAYS, STREETS, BRIDGES.

BROKER.

If purchaser, who was spoken to by brokers, had abandoned all idea of the trade, and they had no influence in bringing it about, they would not be entitled to commissions, although purchaser may subsequently have bought from owner. *Doonan v. Ives*, 341.

BURDEN OF PROOF. See ASSIGNMENT, 8. COMMON CARRIER, 7. HUSBAND AND WIFE, 17, 23, 24. NEGLIGENCE, 14.

BURGLARY. See CRIMINAL LAW, IV.

CASES AFFIRMED, COMMENTED ON, OVERRULED, ETC.

Ballard v. Tomlinson, 26 Ch. Div. 194, differed from. *Snow v. Whitehead*, 230.

Commonwealth v. Thompson, 6 Mass. 134, criticized. *Commonwealth v. Pierce*, 117.

Escanaba v. Chicago, 107 U. S. 678, commented on. *Cardwell v. Bridge Co.*, 272.

Hart v. Western Union Tel. Co., 320. Reversed, 604.

Kansas Pacific Railway Co. v. Lydia H. Sutter, 16 Kas. 568, referred to and distinguished; *Perry*, as Administrator, &c. *v. St. Joseph & Western Railway Co.*, 29 Kas. 420, referred to and commented upon. *Limekiller v. Railroad*, 269.

Meck v. Penn. Co., 38 Ohio St. 632, followed and approved. *Hart v. Deveruz*, 214.

Miller v. Brass Co., 104 U. S. 350, principles of reiterated and explained. *Maher v. Harwood*, 148.

Nicklin v. Williams, 10 Ex. 259; *Backhouse v. Bonomi*, E., B. & E. 622, 9 H. L. Cas. 503; *Whitehouse v. Fellowes*, 10 C. B. (N. S.), 765, discussed; *Lamb v. Walker*, 3 Q. B. Div. 289, overruled. *Mitchell v. Darley Main Colliery Co.*, 432.

Pinnel's Case, 5 Rep. 117 a, and *Cumber v. Wayne*, 1 Str. 426, followed. *Foakes v. Beer*, 21.

Railroad Co. v. Commissioners, 35 Ohio St. 1, distinguished. *Commissioners v. Railroad*, 802.

Spangler v. Cleveland, 35 Ohio St. 469, approved and followed. *Watterson v. Bradley*, 797.

The North Carolina, 15 Pet. 40, distinguished. *The Charles Morgan*, 539.

Thompson v. Herman, 4 Wis., distinguished. *Mathews v. Case*, 146.

Thorogood v. Bryan, 8 C. B. 114, disapproved. *N. Y., L. E. & W. Co. v. Steinbrenner*, 684.

Transfer Co. v. Kelley, 36 Ohio St. 86, followed; *Thorogood v. Bryan*, 8 C. B. 115, disapproved. *St. Clair Street Railway Co. v. Eadie*, 706.

Whitcomb v. Whiting, approved and explained; *Channell v. Ditchburn*, 5 M. & W. 494, and *Goddard v. Ingram*, Q. B. 839, disapproved. *Parker v. Butterworth*, 77.

CERTIORARI. See CORPORATION, 13.

CHAMPERTY. See TORT, 5.

CHARITY. See WILL, 7, 8.

1. House of Refuge, being a charitable corporation, is not liable for damages for assault committed by its officer on inmate. *Perry v. House of Refuge*, 541.

2. Where testator devised all his real and personal estate to one as trustee, to be sold and converted into money when so requested by incorporated religious society, and applied in establishing an orphan asylum, to be under direction and control of such society, held, that devise in favor of charity was devise of money and not of land, and was such as courts of Illinois will uphold. *Germain v. Baltes*, 747.

CHARTER-PARTY. See ADMIRALTY, 1.

CHATTEL MORTGAGE. See MORTGAGE, II.

CHECK.

Holder of, cannot sue bank for refusal to pay on presentation, though drawer have sufficient on deposit to meet it. *Creveling v. Bank*, 72.

CITIZENSHIP. See REMOVAL OF CAUSES.

CITY. See MUNICIPAL CORPORATION.

COLLATERAL SECURITY. See SURETY, 1, 5.

COMMON CARRIER. See ACTION, 10. AGENT, 5-9. CONTRACT, 5. NEGLIGENCE, 5. TELEGRAPH, 7. TELEPHONE, 1, 3.

COMMON CARRIER.

1. Limitation of time in excursion tickets sold at reduced rate, valid. *Pennington v. Railroad Co.*, 209.

2. Where passenger who checked baggage on through ticket with coupon for each road, finds it lost on arrival at his destination, he can hold last road responsible. *Railway v. McIntosh*, 141.

3. If railroad ticket seller deliver to passenger ticket with hole in it, assuring him that it is good, passenger may sue company for his expulsion by conductor for refusing to pay additional fare. *Murdock v. Railroad*, 271.

4. Railway company's liability for passenger's ordinary travelling baggage, does not cover such articles as blankets, books, &c. *McCaffrey v. Railway Co.*, 175, and note.

5. When such goods remain at station at which passenger alights, but it does not appear that company has charged or is entitled to charge for storage, company is not liable as warehouseman. *Id.*

6. Baggage and liability of carrier therefor, generally. *Id.*, note.

7. Although burden of proof is on plaintiff to show that injury was occasioned by negligence of carrier, yet he makes out *prima facie* case by showing that accident happened through failure of some of means used by carrier in making transit. *B. & O. Co. v. Mahone*, 541.

8. If one has purchased ticket and was crossing track by and under direction of ticket agent, for purpose of taking train, he is entitled to all rights and protection of passenger. *Id.*

9. Stipulation in bill of lading as to value of goods, carrier having no other knowledge thereof, and charge for transportation being based upon such valuation, estops shipper from claiming more when goods are lost by negligence of carrier's servants. *Graves v. Railroad*, 73. See *infra*, 17.

10. Where excursion ticket is sold by railroad company at reduced rate, and upon special conditions printed on back of ticket; one of which is that ticket shall be used "for a continuous trip" only, and "is not good to stop off," passenger is bound to take through train and cannot stop off. *Johnson v. P. W. & B. Co.*, 541.

11. In absence of proof that gatekeeper had authority to vary contract, passenger cannot get rid of its conditions, by showing that he took the wrong train, relying on wrong direction given by gatekeeper. *Id.*

12. Plaintiff's intestate, who in pursuance of contract for carriage of horses, and in accordance with custom in such cases, was riding in same car with horses in order to care for them, was killed in collision caused by defendant's gross negligence. *Held*, that he would not be deemed to have been guilty of contributory negligence. *Lawson v. Railway Co.*, 744.

13. Where it is customary for some person to ride in same car with horses, to care for them, it would seem to be within general authority of conductor of train to grant permission so to ride. *Id.*

14. Passenger on railway is responsible for fare of child under his charge, and upon refusal to pay same may, together with child, be ejected from train, although he had paid his own fare. *Railroad v. Hoeflick*, 342.

15. If conductor finds child sitting beside female passenger, and knows father of child is in car, or could know upon proper inquiry, he has no right to hold female responsible for child's fare. *Id.*

16. Passenger wrongfully ejected from train is entitled to such damages as jury judge to be proper compensation for unlawful invasion of his rights, and for injury to his person and feelings. He is not entitled to punitive damages, which require fraud or evil intent or oppression, if ejection was in discharge of supposed duty or without any bad intention. *Id.* See *infra*, 25.

17. Where contract of carriage signed by shipper is fairly made with railroad company, agreeing on valuation of property carried, with rate of freight based on this valuation, contract will be upheld even in case of loss or damage by negligence of carrier. *Hart v. Railroad Co.*, 140. See *ante*, 9.

18. Passenger who, through negligence of one conductor, is not furnished with stop-over ticket, and who, on attempting to resume journey, is required by second conductor to pay additional fare or leave the train, may elect to leave train, and may recover not only additional fare subsequently paid, but all his

COMMON CARRIER.

damages which are direct and natural consequence of fault of first conductor. *Young v. Railway Co.*, 141.

19. Railway company receiving passenger in car before making up train, will be liable for injury to such passenger, resulting from negligence in making up train. *Railroad Co. v. Martin*, 270.

20. Where passenger in overcrowded coach was informed, by conductor's announcement, that another car had been added in front, and adding of car had been felt when it was pushed back, and it was found in proper position, though in fact not securely coupled, so that as passenger was stepping on to it, it moved forward suddenly, causing him to fall, whereby he was injured, *Held*, that passenger was not chargeable with want of ordinary care. *Id.*

21. Where trains of one railway corporation are made up on track of another and by its employees, and the cars belong to other companies, if use of cars and tracks and labor is to enable first corporation to perform its duty as common carrier, passenger injured may sue that corporation. *Id.*

22. Stipulation in shipping contract, voluntarily and understandingly entered into by shipper of livestock, that in consideration of reduced rate any claim for damages shall be made in writing verified by affidavit of shipper or his agent, and delivered to general freight agent of carrier, at his office, within five days from time stock is removed from cars, will bind shipper, and is not void as contrary to law or public policy. *Black v. Railway Co.*, 270.

23. Where party of mature years and sound mind, able to read and write, without imposition or artifice, deliberately signs written agreement without informing himself of contents, he will be bound by it. *Id.*

24. Purchaser of limited ticket over several connecting lines of railroad is not bound to make his journey continuous over all, but only over each coupon of ticket; and over last within time limited, but if last day be Sunday, ticket cannot be refused afterwards, at least when offered on first train after expiration of time. *Railway v. Dean*, 271.

25. Such a ticket expiring on Sunday, and there being no train that day, passenger offered ticket on train next day. It was refused, and passenger, under protest and threat of ejection, paid his fare to further station, and there for want of money, was put off and walked to his destination. *Held*, that extra fare paid, humiliation of being put off train, and inconvenience of reaching destination by walking, were proper elements of damage. *Id.*

26. In selling coupon ticket over successive lines of road, railway company, in absence of express agreement, acts only as agent for roads beyond its own. *Penna. Railroad Co. v. Connell*, 619.

27. Where conductor of railway company, under instructions, refuses to accept ticket issued by another company as agent of former, and demands full fare, passenger, if his ticket was issued by authority, may pay fare again and recover of company requiring payment sum paid, as for breach of contract, or he may refuse to pay, and leave train when so ordered by conductor, and recover of company all damages sustained in consequence of expulsion; but if he refuses to leave, he cannot recover for force used by conductor in putting him off, when no more force is used than necessary, and expulsion is not wanton or wilful. *Id.*

COMMON LAW. See PARTICULAR WORDS AND PHRASES, 1.

CONDITIONAL SALE. See DEBTOR AND CREDITOR, 1, 2.

CONFESSION. See CRIMINAL LAW, 13.

CONFLICT OF LAWS. See ACTION, 7. ASSIGNMENT, 6, 9. CORPORATION, 14, 17, 30. DEBTOR AND CREDITOR, 3. DESCENT, 2. EXECUTORS AND ADMINISTRATORS, 2. GUARDIAN AND WARD, 1. LIMITATIONS, STATUTE OF, 1, 2. MORTGAGE, 12. SUNDAY, 2, 3.

1. Action of tort for diverting waters of natural stream in Massachusetts, and preventing same from coming to plaintiff's mill, in adjoining state, may be maintained in Massachusetts. That certain percentage of water was returned to stream may be considered in estimating damages. *Manville Co. v. Worcester*, 480.

CONFLICT OF LAWS.

2. If assignment is made in Massachusetts between parties domiciled there, of policy of insurance issued by company of another state, but delivered in Massachusetts, questions of validity of assignment, and capacity of parties to contract are to be determined by laws of Massachusetts. *Mutual Co. v. Allen*, 480.

CONSIDERATION. See CONTRACT, 4. FRAUDS, STATUTE OF, 9. MORTGAGE, 24. NOTICE, 4. TELEGRAPH, 2.

CONSPIRACY. See ACTION, 8, 9. CONSTITUTIONAL LAW, 16.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 5, 6. INTERNATIONAL LAW, 2. SCHOOL, 2. TAXATION, 3. UNITED STATES, 4, 5. WILL, 3, 4.

I. *Powers of Legislature.*

1. One state cannot tax capital stock of corporation of another state, which runs a ferry between the two. *Ferry Co. v. Pennsylvania*, 414.

2. Tonnage tax on oyster boats in certain localities, not unconstitutional, as an attempt to regulate inter-state commerce. *Johnson v. Loper*, 73.

3. Nor is license fee upon such boats obnoxious to requirement of state constitution, that property shall be assessed under general laws and by uniform rules, according to its true value. *Id.*

4. Legislature can pass healing acts which do not impair obligation of contracts nor interfere with vested rights. *Green v. Abraham*, 273.

5. What legislature might have dispensed with or made immaterial by previous statute, it may so act upon by subsequent one. *Id.*

6. Bringing of suit vests no right to particular decision. Case must be determined on law as it stands at time of judgment. *Id.*

7. Power of congress to regulate inter-state commerce is exclusive. Its inaction gives states no right to act. *Hardy v. Railway Co.*, 73.

8. Query: Has not congress so legislated by act of June 15th, 1856, sect. 5258, Rev. Stat., authorizing all railroad companies to transport passengers and freight from state to state, &c.? *Id.*

9. Clause of constitution providing that "all laws of a general nature shall have a uniform operation throughout the state," is mandatory. *Ex parte Falk*, 342.

10. Statute providing punishment for act *malum in se* wherever committed, cannot be made local on ground that inhibited act is greater evil in large city than in other parts of state. Instance, having burglar's tools in possession. *Id.*

11. Legislature may impose duty on owners of dams to place therein suitable fishways, and the owner or user cannot by occupancy or user for any length of time acquire prescriptive right against the public. *Parker v. People*, 414.

12. Act allowing municipal corporations to appeal without giving bond, as in other cases, is not unconstitutional, as being either local law or special legislation. *Holmes v. Mattoon*, 273.

13. Public municipalities, including school districts, and all officers suing for or defending rights of state, or acting for or instead of state in respect of public rights, may be authorized to sue without payment of costs, or conforming to all requirements imposed upon other suitors. *Id.*

14. Act of congress of August 3d, 1882, imposing upon vessel owners duty of fifty cents for every passenger not a citizen of this country, brought from foreign port into U. S. port, is a valid exercise of power to regulate commerce with foreign nations. *Head-money Cases*, 210.

15. This duty is designed to mitigate the evils of immigration, and it is not a tax subject to limitations imposed by constitution on general taxing power of congress. *Id.*

16. Right to acquire homestead is a right secured by constitution and laws of United States, within sect. 5508 Rev. Stat., making amenable to penalty those conspiring against free exercise of such rights. *United States v. Waddell*, 73.

17. Irrepealable charter of railroad company gave it power to take lands by condemnation, and provided for appeal by land-owner, from award of damages, to certain court. Held, that general act which took away right to appeal to that court, and gave appeal to another court on same terms and conditions, and with same mode of trial, was not unconstitutional. *State v. Weldon*, 743.

CONSTITUTIONAL LAW.

18. An Indian separated from his tribe and residing among white citizens of a state, but not naturalized, or taxed, or recognised as a citizen, either by the United States or the state, is not a citizen of United States, within 1st sect. of 14th art. of amendment to United States constitution. *Elk v. Wilkins*, 73.

19. Keeping sidewalks in repair is referable to same power as constructing new improvements, and cannot be required to be done by abutting owner or occupant, at his own expense, either by exercise of police power, or by fines and penalties prescribed by ordinance, or by direct legislative action. *City v. Crosby*, 414.

20. City has not constitutional power to require owner or occupant of premises to keep sidewalk and gutters in front thereof free from snow and ice, or to sprinkle same with ashes or sand where snow and ice cannot be removed without injury to pavement, and inflict fine for neglect or failure so to do. *City v. O'Brien*, 414.

21. Sidewalk in city is portion of public highway. *Id.*

22. In absence of constitutional restraints, regulation of liquor traffic is wholly within legislative control. Legislature may empower municipal corporations to entirely prohibit it within their limits. But neither counties, cities, nor towns can impose tax upon privilege not authorized by legislature. *Drew County v. Bennett*, 272.

23. State statute authorizing any person to erect and maintain on his own land a water-mill and mill-dam upon and across any stream not navigable, paying to owners of lands overflowed damages assessed in judicial proceeding, does not deprive them of their property without due process of law, in violation of Fourteenth Amendment of Constitution of United States. *Head v. Manufacturing Co.*, 272.

24. Whether erection and maintenance of mills under such a statute can be upheld as a taking of private property for public use under right of eminent domain, not decided; but, *held*, that such a statute, considered as regulating manner in which rights of proprietors of lands adjacent to a stream may be enjoyed, with due regard to interests of all and to public good, is within constitutional power of legislature. *Id.*

25. Commercial power of Congress is exclusive only when subjects of it are national; when they are local in nature or operation, or constitute mere aids to commerce, the states may provide for their regulation and management until Congress intervenes and supersedes their action. *Cardwell v. Bridge Co.*, 271.

26. Clause in Act of Sept. 9th, 1850, admitting California into Union, which declares "that all the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, imposts or duty therefor," does not lessen power of the state over such waters; notwithstanding it, state can authorize construction of bridges over navigable streams to promote public convenience. *Id.*

27. By terms of Virginia Funding Act of March 30th, 1871, and the issue of bonds and coupons in virtue of the same, a contract was made between every coupon holder and the state that such coupons should "be receivable at and after maturity for all taxes," etc., due the state; the right of coupon-holder, under which, was to have his coupons received for taxes when offered: any act of state which forbids receipt of these coupons for taxes is violation of contract, and void as against coupon-holders. *Poindexter v. Greenhow*, 481.

28. Action brought by taxpayer, who has duly tendered such coupons in payment of his taxes, against tax collector, who, acting under void law of legislature, having refused such tender, proceeds by seizure and sale of property of plaintiff, to enforce collection of such taxes, is not an action against the state within Eleventh Amendment to Constitution of United States. *Id.*

29. Act entitled "an act to authorize independent school-districts to borrow money and issue bonds therefor, for the purpose of erecting and completing school-houses; legalizing bonds heretofore issued, and making school-orders draw six per cent. interest in certain cases," does not violate constitutional provision that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." *Ackley School District v. Hall*, 272.

CONSTITUTIONAL LAW.

30. Under ordinance city of Cleveland improved Kinsman street by grading, draining and paving same. Cost of improvement was assessed upon lots bounding and abutting thereon. The culvert afterwards broke down. City, by another ordinance, provided for construction of new culvert at another point on street, in place of old one, cost of same to be assessed on property bounding and abutting on Kinsman street, within termini of original improvement, but not bounding on culvert. *Held*, that this additional assessment was not authorized by law. *Watterson v. Bradley*, 797.

31. CONSTITUTIONAL REGULATIONS OF LEGISLATIVE PROCEEDINGS, 153.

II. Powers of the Judiciary.

32. While state courts can exercise no jurisdiction in cases peculiarly cognizable in admiralty, yet the saving in the United States statute, to suitors in all cases, of "the right of a common-law remedy where the common law is competent to give it," permits of a proceeding in state court, for injury to dredge, by attachment, although this remedy did not exist at common law, but has been conferred by statute. *Walter v. Kirstead*, 141.

III. Eminent Domain. See *ante*, 23.

33. General grant of legislative power in state constitution does not authorize legislature, by right of eminent domain or of taxation, to take private property without owner's consent, for any but public object: as by authorizing city to issue its bonds by way of donation to private manufacturing corporation. *Cole v. La Grange*, 272.

CONSUL. See AGENT, 1, 2.

CONTEMPT. See MALICIOUS PROSECUTION, 4.

1. Definition of direct and constructive contempt of court. *In re W. W. D. H.*, 74.

2. D. executed his recognisance to appear in court at certain time, and submit to trial on criminal charge pending against him. He did not so appear, but absented himself from the county where the court was held. *Held*, that he could be punished for contempt by fine or imprisonment. *Id.*

CONTRACT. See ACTION, 11-13, 15. AGENT, 6-9. COMMON CARRIER, 22, 23. CONFLICT OF LAWS, 2. EQUITY, 7-9. FRAUD, 1, 2. FRAUDS, STATUTE OF, 12. GUARANTY, 1. HUSBAND AND WIFE, 22-27. MORTGAGE, 23-25. SUNDAY, 1-3, 6. TELEGRAPH, 2, 3.

1. Statute provided that City Board of Public Works might hire employees subject to approval of their compensation by council when it exceeded \$1000 per annum. *Held*, that mere non-action by council would not defeat agreement made by board. *Matheson v. Tripp*, 415.

2. When anything is left to be settled in respect to offer by mail or telegraph, acceptance of offer by telegraphing will not complete contract where dispatch does not reach its destination. *Haas v. Myers*, 415.

3. In such a case where dispatch did not reach its destination, and second dispatch was sent and received on same day that sender and third party had concluded the purchase contemplated to have been made by sender and receiver, *held*, that receiver's offer, on his arrival the next day, to pay his share of price, was too late. *Id.*

4. After note had matured, but was still held by payee, two sons of maker, in order to induce payee not to pass note into hands of third person, and to give further time for payment, placed their names under that of their father. *Held*, 1st. That there was good consideration to support contract, which was to pay amount of note on demand. 2d. That contract was not within Statute of Frauds. *Frech v. Yawger*, 680.

5. A mower company, owner of certain mowing machines, consigned and forwarded them to D., on contract, under which D. was to pay the freight and sell them for specified commission, and account to company for them at specified price. *Held*, 1. That contract did not change title; 2. D. had such special property in machines, as to enable him to sue carrier for wrongful act to property, and recover his own damages and such as accrued to company as general

CONTRACT.

owners; 3. A sale of property after damage had accrued, would not transfer claim to damages. *Railroad Co. v. Mower Co.*, 74.

6. By written memorandum A. agreed to buy, and the B. company to sell, 1000 tons of old rails, delivery to be before August 1st, and also 200 to 600 tons for delivery between August 1st and October 1st. Contract was dated January 31st, 1880, and was signed by vice-president for company, and he had full authority to make it. On February 17th vice-president wrote to A. inclosing minute of resolution, purporting to have been passed at meeting of directors of company on February 16th confirming contract, but specifying 2000 pounds, as ton contemplated. On February 28th A. replied to this letter, saying that the sale was "an absolute and final unconditional sale," and that number of pounds per ton was to be 2240. This was number understood between the parties at time of making contract. No reply was made to last letter, which ended with "we hope to hear from you at your early convenience," until June 14th, when company wrote tendering 1000 tons of 2240 lbs. By that time price of old rails had fallen. *Held*, that contract was in full force, and that company was not estopped from setting it up against A. *Wheeler v. Railroad Co.*, 680.

7. VALIDITY OF CONTRACTS IN RESTRAINT OF TRADE, 217, 281.

CONVERSION. See CHARITY, 2.

COPYRIGHT.

1. Statute appointing state reporter, authorizing secretary of state to contract for publication of his reports and giving to contractor exclusive right to publish same, confers no right to copyright, nor any exclusive right to publish, opinions of court. *Banks v. Manchester*, 519 and note.

2. *Quære*, Whether state, through its reporter, can secure copyright in opinions of its judges. *Id.*

3. Copyright of legal works, generally. *Id.*, note.

CORPORATION. See BILLS AND NOTES, 3. CONSTITUTIONAL LAW, 17. EQUITY, 13. MALICIOUS PROSECUTION, 12. MARRIED WOMEN AS CORPORATORS, p. 366. MUNICIPAL CORPORATION. RECEIVER, 2. REMOVAL OF CAUSES, 2, 3. TAXATION, 2-4.

1. There is no liability on subscription to stock of corporation with fixed capital, until whole amount is subscribed. *Temple v. Lemon*, 481.

2. Such subscriber cannot be held individually liable for debt of corporation, unless he has estopped himself from alleging that whole of fixed capital stock was never subscribed. *Id.*

3. Cannot defend itself, in action for tort done by it, on ground that business in prosecution of which tort was done was *ultra vires*. *Railway Co. v. Haring*, 681.

4. Agent of railroad company ejected, with unnecessary violence, passenger from cars. *Held*, the company was liable for injury to passenger. *Id.*

5. President of, by virtue of his office, cannot encumber its property by mortgage or judgment confessed for money borrowed. *Stokes v. Pottery Co.*, 74.

6. His being owner of nearly all its capital stock, and its president, treasurer and active manager, and being accustomed to borrow money for company's use, will not give him this power. Powers of president generally. *Id.*

7. Corporation having become insolvent, its receiver, as representative of creditors, can object that confessed judgment against corporation, was not so obtained as to bind it. *Id.*

8. Cause of forfeiture of franchise can only be taken advantage of or enforced by direct proceeding for that purpose. *Attorney-General v. Railroad Co.*, 619.

9. Where corporation is absolutely dead in law, court of equity has jurisdiction to enjoin threatened acts by persons assuming to act on behalf of, and in name of dead corporation. *Id.*

10. And if valid corporation assumes to exercise licenses or powers by virtue of invalid ordinance of municipal corporation, or in excess of authority legally conferred upon it, court of equity may restrain it. *Id.*

11. Is liable to any one who has accepted its stock certificate and acted thereon to his injury, to extent that loss has actually been incurred. *Bank v. Baltimore*, 543.

CORPORATION.

12. If charter provides that corporation shall cease to exist if certain thing is not done in certain time, question whether corporation has ceased to exist can be judicially determined only in suit to which Commonwealth is party. *Briggs v. Canal Co.*, 75.

13. Gas companies having right to use streets of city for their pipes may, by *certiorari*, challenge legality of municipal proceedings designed to give similar rights to rival companies, and individuals owning soil of street may also question claim of a gas company to lay its pipes therein. *People's Co. v. Jersey City*, 75.

14. Foreign insolvent corporation, if still in existence, can be compelled by mandamus or bill in equity to collect its unpaid subscriptions wherever stockholders may reside; and if it has ceased to exist, receiver should be appointed, and courts of other states would recognise right of receiver, same as they would of corporation itself, if still in existence, to prosecute actions at law, for recovery of unpaid subscriptions. *Patterson v. Lynde*, 542.

15. Unpaid subscriptions are trust fund for payment of debts of corporation, which is the trustee. When, therefore, corporation has ceased to exist, then court of equity will take jurisdiction and wind up its affairs. *Id.*

16. To enforce liability of stockholder for his unpaid stock, it is indispensable that corporation (or if it has ceased to exist, all its stockholders and creditors) should be before court. *Id.*

17. While foreign receiver should not be permitted, as against claims of resident creditors, to remove assets of debtor, yet he may be allowed to do so when resident creditors have no fixed legal claim to the property; so, when creditors have not fixed liens thereon, he may sue for unpaid subscriptions, and collect same, subject to order of court appointing him. *Id.*

18. If officer of private corporation performs an illegal act, or such act (*e. g.* excluding colored persons from omnibuses) is performed by his orders where he has authority to control servant doing act, and injury results therefrom, officer will be liable in damages to injured person, although corporation may also be liable. *Peck v. Cooper*, 542.

19. Retaining of servant of company after knowledge is brought home to officer or agent of company of his misconduct, resulting in personal injury to another, has been held evidence characterizing *animus* of those controlling company, and as ingredient in measure of damages. *Id.*

20. Where act incorporating railroad company authorized a mortgage of its "charter and works" and exempted it from certain taxation, *held*, after foreclosure under such mortgage and reorganization of company, that the exemption from taxation did not extend to reorganized company. *Railroad Co. v. Commissioners*, 210.

21. Trustees of, who are liable under statute, in consequence of failure to publish and file report of capital and debts within twenty days after first of year, for "all the debts of the company then existing," are not liable for amount of judgment recovered in suit in tort against company before first of year in question. *Chase v. Curtis*, 342.

22. Although existence of corporations voluntarily organized under general statutes, cannot be questioned collaterally, yet if they have resulted from fraudulent combinations of individuals to procure powers, under circumstances and for purposes not within legislative intent, who under shelter of their charter are about to exercise powers oppressive to an individual, they may be restrained by private suit of those injured, or about to be. *Neimeyer v. Railroad*, 75.

23. When proposed act of railroad company in taking land for its track is unauthorized, it may be restrained by injunction. *Id.*

24. By-law of religious society provided for the dropping from its list of any member ceasing to regularly worship with the society, or failing to contribute to support of its public worship for one year. *Held*, that vote of society, after hearing, was necessary. *Gray v. Society*, 273.

25. By-law of such society provided that object for which special meeting was called, must be stated. Another by-law provided that new member must be approved by vote of society. *Held*, that elections of new members at special

CORPORATION.

meeting warrant for which contained no article for admission of new members, but contained general article, "To transact any other business that may legally come before said meeting," were invalid. *Id.*

26. Where transaction with incorporated banking association properly pertains to business of such association, neither abuse or disregard of his authority by managing officer or agent, nor his fraud or bad faith will be permitted to be shown in defence of such bank in action against it by innocent party, growing out of such transaction. *Bank v. Blakesley*, 343.

27. Creditor defrauded by misrepresentations of real capital of bank has remedy in tort against all who participated in fraud, but entire body of creditors who have not suffered from alleged fraud cannot recover from entire body of stockholders who have taken no part in it. Even where suit is prosecuted for creditors by receiver, pleadings should set forth facts entitling each creditor to action; and it is essential that creditor should have acted on the misrepresentation to his injury. *Fouche v. Brower*, 141.

28. Steamship company transferred its ships and other property to another company organized to succeed it, and officers in old company became officers in new, and business went on under their direction. After transfer, man was killed by collision between canal boats and one of steamships transferred to new company. His widow sued and obtained judgment against old company. *Held*, that property transferred to new company could not be subjected in equity to payment of this judgment. *Gray v. Steamship Co.*, 481.

29. Secretary of joint stock company issued share certificate signed by himself and under seal of company (which had been improperly affixed), and with forged signature of a director. It was duty of secretary to have transfers registered, to procure preparation, &c., of certificates and to issue them. Transferee of person to whom forged certificate was issued, applied to company to have shares registered in his name and was refused. *Held*, that transferee was entitled to recover value of shares from company. *Shaw v. Mining Co.*, 90, and note.

30. Fire insurance company incorporated in Pennsylvania is entitled to bring in Maryland court, for use of receiver of such company appointed in Pennsylvania by decree which declared the company dissolved, but referred to the act which authorized the decree, and which act authorized the appointment of a receiver, "with power to prosecute and defend suits in the name of the corporation, or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement" of its unfinished business, an action to recover from Maryland policy holder assessment upon his premium note, where the suit is not brought by receiver in his official capacity. *Lycoming Co. v. Langley*, 210.

CORPSE.

1. Administrator has no such property in body of decedent as will enable him to recover damages for its mutilation through negligence of railroad. *Griffith v. Railroad*, 586, and note.

2. *Semle*. He may, however, recover damages in such case for destruction of the apparel on such body. *Id.*

3. Rights of living persons over dead bodies. *Id.*, note.

COSTS. See ATTORNEY, 4. ERRORS AND APPEALS, 2. INFANT, 4.

COUNTY. See MUNICIPAL CORPORATION.

COURTS. See COPYRIGHT. JUDGMENT, 2. MANDAMUS, 2. WILL, 4.

Decree of Orphans' Court, granting letters of administration, cannot be questioned collaterally. *Plume v. Howard Ins.*, 75.

CREDITORS' BILL. See UNITED STATES COURTS, 3.

CRIMINAL LAW. See CONSTITUTIONAL LAW, 10. EVIDENCE, 12. INTOXICATING LIQUORS, 1. TRIAL, 6. WITNESS, 1, 2.

I. Generally.

1. In Kansas coercion of wife is not presumed, but is a question of fact for jury. *State v. Hendricks*, 76.

CRIMINAL LAW.

2. Person on trial for assault with intent to murder, is competent to testify as to purpose for which he procured instrument with which he committed assault. *Fenwick v. State*, 745.

3. Former conviction is bar to any offence of which defendant might have been convicted under indictment and proof in first case. Instance, several different sales of liquor. *State v. Nunelly*, 76.

4. At trial testimony of witness, identifying defendant by his voice, whom witness has heard speak only once before occasion of commission of offence charged, which was after dark, is competent. *Commonwealth v. Hayes*, 543.

5. Person sentenced to imprisonment for infamous crime, without having been presented or indicted by grand jury, as required by Fifth Amendment of Constitution United States, is entitled to discharge on *habeas corpus* from Supreme Court United States. *Ex parte Wilson*, 481.

6. Crime punishable by imprisonment for term of years at hard labor, is an "infamous crime" within this amendment. *Id.*

7. In separate trial of one of two persons jointly indicted for murder, other defendant, even while indictment is still pending against him on plea of not guilty, may, with his own consent, be called as witness against co-defendant. *State v. Barrows*, 142.

8. "Reasonable doubt," definition of, and instruction of jury as to what proof of guilt the law requires. *State v. Rounds*, 142.

9. Prisoner is in jeopardy from time that jury is impanelled and sworn in court of competent jurisdiction upon sufficient indictment; and entry of *not pros.*, or discharge of juror, after that, without his consent, operates as an acquittal, except in cases of overruling necessity, as death or illness of judge or juror, or inability of jury to agree on verdict. *Whitmore v. State*, 274.

10. At common law court trying party for crime committed within its jurisdiction, will not investigate manner of his capture in foreign state or country. *Ker v. People*, 142.

11. Fugitive from justice guilty of offence for which he is subject to extradition, has no asylum in foreign country. When extradited he cannot be tried for any other offence than that for which he has been extradited, without first being afforded an opportunity to return. But this doctrine does not apply when he has been brought back forcibly; and for his illegal and forcible removal from foreign country, the country alone can complain. *Id.*

12. Where there is no extradition treaty no obligation to surrender criminals exists; but as matter of comity between friendly nations, great offenders are usually surrendered on request. *Id.*

13. Confession of prisoner with proof that offence was actually committed by some one, will warrant conviction. *Melton v. State*, 273.

14. Defendant cannot be convicted upon testimony of partakers in crime, whether his guilt be in same degree or not, unless corroborated by evidence to connect defendant with commission of offence; corroboration is not sufficient, if it merely prove *corpus delicti* and circumstances thereof. *Id.*

15. Court will reverse judgment of conviction, in case of felony, where evidence on which it is based is all circumstantial and of unsatisfactory character. Province of jury and duty of court. *Mooney v. People*, 274.

II. *Assault.* See *ante*, 2.

16. Where assault and battery complained of were part of one preconcerted affray, evidences of other fights engaged in by defendants in execution of their unlawful purpose, is admissible. *Rhinehart v. Whitehead*, 746.

17. One who goes to place with others with intent to get up fight with persons there, may be liable for assault and battery committed in execution of that purpose, although he did not actually participate in such assault. *Id.*

III. *Bastardy.*

18. Bastard may not be exhibited to jury for purpose of showing by its likeness to defendant that it is his child. *Hanawalt v. State*, 746.

IV. *Burglary.*

19. Lifting of latch and pushing open closed door, with intent expressed in statute, is a sufficient breaking. *State v. Groming*, 274.

CRIMINAL LAW.

V. *Carrying weapon.*

20. Not necessary to prove that pistol was loaded. *State v. Wardlaw*, 76.

VI. *Gambling.*

21. Selling of pools on horse races, and keeping of rooms where such pools are sold, do not constitute offence within statute prohibiting keeping of gaming table or other place of gambling, and which declares that all games, devices and contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming table. *James v. State*, 745.

VII. *Larceny.* See DURESS, 2.

22. Possession of stolen property is not alone sufficient to sustain conviction. It must appear that property was recently stolen; possession must be unexplained, and in some form involve assertion of property in possessor. *Shepherd v. State*, 416.

23. At common law there are three cases in which conviction for larceny may be sustained when apparent possession is in accused: 1st. Where accused has mere custody of property, as contradistinguished from possession, as in case of servants, guests and the like: 2d. Where he obtained custody and apparent possession by means of fraud, or with purpose to steal property; and 3d. Where one has acquired possession by valid contract of bailment, which is afterwards terminated by some tortious act of bailee, or otherwise, whereby possession reverts to owner, leaving custody merely with former, and he feloniously converts property to his own use. *Johnson v. People*, 745.

24. Where owner intends to part both with title and possession, and property is delivered in pursuance of such intention, person receiving it cannot be convicted of larceny, although transfer was induced by fraud of latter, and with a purpose to steal it. *Id.*

VIII. *Manslaughter.*

25. To constitute manslaughter, where there is no evil intent, it is sufficient if the killing is result of reckless or foolhardy presumption, judged by standard of what would be reckless in man of ordinary prudence under same circumstances. Rule applied where woman died from treatment administered with her consent, of one who publicly practised as physician. *Commonwealth v. Pierce*, 117, and note.

IX. *Receiving Stolen Goods.*

26. If pigeons are stolen from house in which they were confined by owner, and are found in possession of person who bought them of another about two weeks after larceny, latter may be convicted of such larceny if his possession of pigeons is not satisfactorily explained. *Commonwealth v. Deegan*, 544.

DAMAGES. See AMENDMENT. BAILMENT, 4. COMMON CARRIER, 16, 18, 25, 27. CONFLICT OF LAWS, 1. CONTRACT, 5. CORPORATION, 19. EASEMENT, 2. EQUITY, 17, 18. FORMER RECOVERY, 3. INSURANCE, 7. MALICIOUS PROSECUTION, 2. NEGLIGENCE, 11, 16, 40. PLEADING, 5, 6. RAILROAD, 2. TELEGRAPH, 2, 9.

1. In action for assault and battery where punitive damages are recoverable, financial condition of defendant may be shown by evidence of his reputed wealth. *Draper v. Baker*, 142. See *infra*, 5.

2. Verdict of \$1200 for assault and battery by spitting in plaintiff's face, is not so large as to induce court to believe that jury were actuated by passion, prejudice, or other improper motive. *Id.*

3. Measure of, for breach of contract to assign insurance policy to purchaser of insured property is only the amount necessary to procure policy for remainder of time it had to run. *Dodd v. Jones*, 34, and note.

4. Measure of, for breach of contract generally, especially in margin transactions. *Id.*, note.

5. On trial of action of trespass for assault and battery, plaintiff may give in evidence pecuniary circumstances of defendant to enhance his damages, and defendant may then give counter evidence; but unless such evidence is given by plaintiff defendant has no right to introduce proof on that subject, even in mitigation of damages. *Mullin v. Stangerberg*, 544.

DAMAGES.

6. For death of any person are limited by statute to such as arise from pecuniary injury to widow and next of kin. Injury received by some of next of kin, by dissolution of partnership relation between them and deceased, is not within statute. Injury claimed to arise by deprivation of such services and counsel as father might probably give to his children, must be limited to such services and counsel, as would be of pecuniary advantage. *Denarest v. Little*, 746.

7. Where injury claimed is deprivation of probability of receiving such probable accumulations as deceased might have made if he had continued in life, income derivable from funds invested, and which next of kin have received, should not be taken into account, and due weight must be given to contingencies which might diminish probable accumulations or divert them from next of kin. *Id.*

8. In action of trespass against railroad for running cars over ground, title to which, owing to failure to comply with certain statutory requisites, never vested in railroad, *held*, that plaintiff should be confined to damages caused by running cars over the ground. *Railroad v. Boyd*, 797.

DEATH. See **ACTION**, 2, 3.

DEBTOR AND CREDITOR. See **ACTION**, 15. **ASSIGNMENT**, 11. **ESCAPE.**

EXEMPTION. **PAYMENT**, 1. **SALE**, 8, 9.

1. Property sold conditionally and delivered, without legal record of lien, passes to assignee of vendee under Vermont insolvent law. *Collender Co. v. Marshall*, 620.

2. Contract by which vendee of billiard tables agrees to pay in monthly instalments in one year entire value of tables, and if he so paid property was to be his, and if not, vendor's, is a conditional sale and not a lease. *Id.*

3. Where one in Vermont orders goods from party in New York on certain terms, as to payment, &c., but they are shipped, consigned to vendor, and accepted on different terms, *Held*, that contract was made in Vermont. *Id.*

4. Purchaser of real estate at execution sale may in equity avoid conveyances previously made by judgment-debtor in fraud of his creditors. *Belcher v. Arnold*, 416.

5. Right to recover property conveyed in fraud of creditors by debtor subsequently adjudicated bankrupt, is vested in assignee alone, and cannot be exercised by creditors in case of assignee's failure to bring action within time limited. *McCartin v. Perry*, 416.

6. Complainant recovered judgment at law against defendant's brother for false imprisonment, and afterwards filed creditor's bill to set aside, as fraudulent, two conveyances of land by brother to defendant. Evidence showed that lands in fact belonged to defendant, although legal title had been in name of brother. *Held*, that there was, against defendant, no ground of estoppel. *Lillis v. Gallagher*, 416.

DECEDENTS' ESTATES. See **EQUITY**, 19, 20. **EXECUTORS AND ADMINISTRATORS.**

DECLARATIONS. See **EVIDENCE**, 20.

DEED. See **ACKNOWLEDGMENT**. **GIFT**, 3. **INFANT**, 2, 3. **NOTICE**, 2. **TRUST AND TRUSTEE**, 3.

1. Mother was induced by son, while she was in feeble state of mind, to execute deed to him for her land, including her homestead, under assurance and belief that it would not take effect until recorded, and grantee agreed not to procure same to be recorded during life of grantor. *Held*, deed would not take effect as to grantee, and grantor might destroy same at pleasure. *Sands v. Sands*, 544.

2. B., being owner in fee of tract of land conveyed to his mother an undivided third part of it during her widowhood. Subsequently B. and his wife conveyed same land to W. by deed, granting clause of which states that grantors conveyed unto W. "all their estate," &c., in "the following described parts of tracts or parcels of land. * * * It is understood by the parties herein mentioned, that the interest herein conveyed is the two-thirds of the above

DEED.

described land." *Held*, that this deed only conveyed to W. a two-thirds interest in the land described. *Zittle v. Weller*, 747.

3. Rule that of two contradictory or repugnant clauses in deed first shall prevail, does not apply to supposed contradiction between parts of same clause. *Id.*

DELIVERY. See **BAILMENT**, 1, 2, 4. **GIFT.**

DEMURRER. See **HUSBAND AND WIFE**, 18. **PLEADING**, 5, 6.

DESCENT.

1. At common law, bastard has no right of inheritance. In Illinois, bastard may, under statute, inherit from its mother, but not from its father, unless he shall have married the mother and acknowledge child as his own. *Stoltz v. Doering*, 544.

2. Descent and heirship of real estate are exclusively governed by laws of country within which property is actually situated. *Id.*

DEVISE. See **CHARITY**, 2. **WILL.**

DIVORCE. See **HUSBAND AND WIFE**, I.

DOMICILE. See **ATTACHMENT**, 1. **HUSBAND AND WIFE**, 3, 11, 14. **PARENT AND CHILD**, 2.

1. Presence and intention to remain in place only while a student, do not confer domicile. Presumption is against student's right to vote. *Sanders v. Getchel*, 76.

2. Grandfather or grandmother of infant, when next of kin, is guardian by nature of such infant; and infants having domicile in one state, who after death of parents take up residence at home of paternal grandmother and next of kin in another state, acquire her domicile. *Lamar v. Micou*, 481.

DONATIO CAUSA MORTIS. See **GIFT**, 1, 2.

DURESS.

1. Note and mortgage given by mother to son's employer, from whom he had embezzled, with protection of son from exposure and prosecution as controlling motive, will be cancelled. *Foley v. Greene*, 416.

2. No action can be maintained upon promissory note, given by person under arrest on complaint for larceny of property, exceeding in value \$100, to owner of property alleged to have been stolen, under agreement that complaint shall be placed on file, plaintiff having received note with notice of circumstances; question of guilt or innocence of accused not open in such action. *Gorham v. Keyes*, 482.

EASEMENT.

1. Burden of proof is on defendant who sets up prescriptive right to have water flow on plaintiff's land from roof of his artificial structure; not sufficient to show that structure had been in same condition for more than twenty years. *Hooten v. Barnard*, 76.

2. Plaintiff proving an invasion of his rights by defendant is entitled to at least nominal damages. *Id.*

EJECTMENT. See **MUNICIPAL CORPORATION**, 11. **TRESPASS**, 2. **UNITED STATES**, 2.

1. Where land is forfeited to state for non-payment of taxes, and state fails to convey title to purchaser for reason of illegality in its sale, original owner has better title than purchaser. *Chandler v. Wilson*, 798.

2. Person having for over twenty years a recorded deed of township of mainly wild land, during the time lumbering on some portions of it and cultivating others, does not thereby divest true owner of his title of certain lots within township, such lots not having been occupied during that period of time. *Id.*

3. Person who obtains title of three of five heirs of owner of land, deceased, can recover only three undivided fifths of the land of a person in possession, although latter person does not occupy under other heirs. *Id.*

ELECTIONS. See DOMICILE, 1.

EMINENT DOMAIN. See CONSTITUTIONAL LAW, III. CORPORATION, 23.

EQUITY. See ASSIGNMENT, 7, 8. BANK, 3. BILLS AND NOTES, 10. CORPORATION, 9, 10, 14-16, 28. ERRORS AND APPEALS, 3. EXECUTORS AND ADMINISTRATORS, 5. FRAUDS, STATUTE OF, 4, 12. HUSBAND AND WIFE, 20, 25, 27. NOTICE, 4. PARENT AND CHILD, 3. PARTITION, 2. PARTNERSHIP, 10, 14. RAILROAD, 5-7. SALE, 5. SET OFF, 3. SPECIFIC PERFORMANCE.

1. Dismissal of bill on demurrer carries cross-bill with it. *Johnmensen v. Tauer*, 143.

2. Where person seeks to reform instrument on ground of mistake, the mistake and exact form intention of parties requires instrument to assume, must be indubitably shown. *Keedy v. Nally*, 798.

3. The application for relief must be made with due diligence, and time runs from discovery of mistake. *Id.*

4. Will not interfere to remove cloud upon title in favor of party out of possession, claiming under legal title, against antagonist who is in possession under written title. *Weaver v. Arnold*, 682.

5. Motion by defendant in bill, to set aside interlocutory decree, and for leave to file new answer, is addressed to discretion of court, with which higher court will not interfere, unless discretion has been abused. *Schmidt v. Braley*, 482.

6. Proper practice in case defendant desires to file new answer, is to prepare and submit it with motion for leave to file. *Id.*

7. In action to reform contract and for relief thereunder, after same is reformed, court may specifically enforce same, or give adequate compensation for its non-performance. *Railroad v. Steinfeld*, 482.

8. On trial of action to reform and enforce or rescind written contract, there may be given in evidence the original writing made by same parties, and also the subsequent acts done or procured to be done by party charged with fraud, and which tend to prove fraud or mistake. *Id.*

9. On such trial it is error to order contract set aside if party complaining neither pays back nor offers to return money received by him under contract. *Id.*

10. By practice of United States Supreme Court, decree *pro confesso* is not a decree as, of course, according to prayer of bill, nor merely such as complainant chooses to make it, but is made according to what is proper to be decreed upon statements of bill assumed to be true. *Thompson v. Wooster*, 417.

11. Defendants cannot allege anything in derogation of such decree, unrevoked, or question its correctness on appeal, unless on face of bill it appears manifest that it was improperly granted. *Id.*

12. Delay of fourteen years in application for re-issue of patent is strongly presumed to be unreasonable, but court cannot say, as matter of law, that it is not susceptible of explanation; and this defence cannot be set up after decree *pro confesso*. *Id.*

13. Where trustees of corporation gave bond, secured by mortgage on corporate property, which, in strict legal effect, bound them individually, court of equity will enjoin action at law against them thereon, if it appears that there was no intention on their part to become personally liable. *Maps v. Cooper*, 343.

14. Policy of insurance issued in name of agent of owner of vessel, instead of in name of principal, through mistake of insurance company's agent in preparing application, without any representation or mistake of owner or applicant, may be rectified after loss of vessel, although agent signed application with his own name "for applicant." *Hill v. Insurance Co.*, 416.

15. After decree disposing of issues and in accordance with prayer of bill, it is not competent for one of parties without service of new process or appearance, to institute further proceedings on new issues and for new objects, although connected with subject-matter of original litigation, by merely giving new proceedings title of original cause. *Smith v. Woolfolk*, 682.

16. If one complainant can, under any circumstances, have decree against another upon supplemental or amended bill, it must be upon notice to latter. *Id.*

17. Court of, has no inherent power to ascertain damages by reason of tor-

EQUITY.

tious acts unattended by profit to wrongdoer. There must be some joint interest of parties in the property for court of equity to assess the damages. In case of trespass where no such relation exists equity will follow the rule of law as to the damages. *Atlantic Co. v. Maryland Co.*, 211.

18. The right to maintain action of *quare clausum fregit* exists in Maryland, whether defendant committed the trespass unwillingly or wilfully. If adjoining owner has made mistake as to his title or boundaries in mining coal, lowest measure of damages is value of coal immediately upon conversion, without abatement of cost of severance. Equity cannot change this measure. *Id.*

19. It appearing that two sons had worked their father's farms, under agreement that they should do so until they had accumulated for him a fund of \$12,000, and then they should have the farms free of rent during his life, and that specified sum had been gathered about a year before father's death, and thereafter sons had enjoyed use of farms free until father died; *Held*, that sons had no reason to complain, on appeal, that chancellor had made too small an allowance to them for services rendered under that contract. *Larison v. Polhemus*, 343.

20. Parties who in pleadings and proofs, have insisted that they were not accountable to him for rental value of land of which ancestor died seised, because they were in possession as equitable owners, cannot, at hearing, shift their ground, and claim that they were tenants of ancestor's widow, who might have been entitled to hold the land until her dower was assigned, but who has disclaimed such right. *Id.*

21. Favorite son induced mother to make conveyance of all her estate to him, upon assurance that it would not take effect in her lifetime. Mother was 73 and greatly weakened in body and mind from disease and sickness, so as to be incapable of transacting business, and proof showed deed was not intended by her to have effect before her death, but was handed to son to be placed with her papers, and upon her recovery she destroyed deed. *Held*, that trial court erred in decreeing that mother execute another deed in place of one destroyed, and in dismissing her cross-bill to have conveyance made set aside. *Sands v. Sands*, 544.

22. Statements by defendant who was subsequently arrested on a *ne exeat*, made to complainant's lawyer, that if suits should be begun against him, and he should be likely to get the worst of it, or if any order should be made against him by any court, his lawyer would find it out beforehand and would let him know, so that he could and would leave the state before they could do anything with him, accompanied by other statements, that complainant and her father were poor, and that he would law them both to death if they attempted any suits against him, and that he had put all his property out of his hands, but still had the benefit of it, are sufficient, on application for discharge, to hold him in custody under the *ne exeat*. *Cary v. Cary*, 417.

ERRORS AND APPEALS. See ADMIRALTY, 2. CONSTITUTIONAL LAW, 12. CRIMINAL LAW, 15. INFANT, 7. PRACTICE, 1, 2.

1. Opinion of lower court not part of record in United States Supreme Court. *England v. Gebhard*, 211.

2. Supreme Court United States, upon dismissing writ of error for want of jurisdiction, can adjudge to defendant in error costs incident to motion to dismiss, but no others. *Bradstreet Co. v. Higgins*, 482.

3. Decrees in favor of complainants in creditor's bill, for certain sums of money, are several, and one whose decree is for less than \$5000 cannot appeal to Supreme Court United States. *Stewart v. Dunham*, 682.

4. Judgment of State Supreme Court was, that judgment of State District Court be reversed with costs, with directions to County Court to enter judgment upon findings for plaintiff as prayed for in his complaint. *Held*, final for purposes of writ of error to United States Supreme Court. *Mower v. Fletcher*, 417.

ESCAPE.

1. Ancient rule that debtor in execution, by voluntary escape became discharged both from imprisonment and debt, leaving creditor to look to sheriff alone for debt, is no longer in force, and upon such escape he may be re-arrested and imprisoned. *People v. Hanchett*, 274.

ESCAPE.

2. Where debtor has been legally arrested by sheriff under *ca. sa.* running in name of people, and is enlarged on bond for his appearance, on day set for hearing of his application for discharge, court, on refusing discharge, may order him back into officer's custody without process in name of people, and this may be verbally done. *People v. Hanchett*, 274.

ESTOPPEL. See AGENT, 4. COMMON CARRIER, 9. CONTRACT, 6. CORPORATION, 2. DEBTOR AND CREDITOR, 6. EXECUTION, 4. HUSBAND AND WIFE, 8. REMOVAL OF CAUSES, 7.

If A. is informed by B., adjoining owner, that B. proposes to erect wall on his own land, at his own expense, and A. assents to building of wall according to B.'s line, as established by survey of C., A. is not estopped to maintain writ of entry against B., after wall has been built, for land erroneously included in such survey, if in so assenting he acted under mistake of fact. *Proctor v. Putnam Co.*, 212.

EVIDENCE. See ACCOUNT, 1. ADMIRALTY, 3. AGENT, 7-9. ATTORNEY, 3. BURDEN OF PROOF. CORPORATION, 19. CRIMINAL LAW, 2, 4, 13-16, 18, 20, 22, 26. DAMAGES, 1, 5. EASEMENT, 1. EQUITY, 8, 22. EXPERT. FRAUDS, STATUTE OF, 11. HIGHWAYS, &c., 2, 6, 7, 9. INFANCY, 4. INSURANCE, 8, 9, 14. INTOXICATING LIQUORS, 1. NEGLIGENCE, 7, 8, 11, 30. PARTNERSHIP, 7, 12, 13. POSSESSION, 3. SUNDAY, 4. STATUTE, 3. TELEGRAPH, 5. TORT, 3. TRIAL, 1. UNITED STATES COURTS, 2. WITNESS.

1. Matters of practice in another state may be proved by testimony of lawyers in that state. *Blackwell v. Glass*, 77.

2. Justice's judgment from another state cannot be proved by certified copy of his minutes. The original minutes must be produced, or copy verified by witnesses who have compared it with original. *Id.*

3. In action for personal injuries court may, in proper case, at the trial direct plaintiff to submit to personal examination by physicians on behalf of defendant. *White v. Railway Co.*, 527, and note.

4. But it is not error for court to refuse to so order, in absence of any showing that justice would be promoted thereby, and especially so when plaintiff submits to such examination in presence of jury. *Railroad Co. v. Finlayson*, 532, and note.

5. When official reporter is not present at trial to take down exact words—court having made no minutes—and counsel disagree as to what witness said on material matter, question is for jury; and this although defendant moved for nonsuit. *Porter v. Platt*, 752.

6. In such case testimony of attorney, with his minutes taken on trial, is not admissible to strengthen or weaken that of witness given on same trial. *Id.*

7. Whether physician is qualified to testify as an expert upon questions of insanity, is question of fact for presiding judge, whose decision will only be reviewed in extreme cases. *Fayette v. Chesterville*, 799.

8. Skilful and reputable physicians, although not expert upon subject, may testify to mental condition of their patients when they have adequate opportunity of observation. But this does not embrace case where single examination was made by physician to qualify himself as witness in pending litigation. *Id.* See EXPERT.

9. In action for personal injury plaintiff's attending physician testified that he had examined plaintiff, who stated the symptoms, and that he had suffered pain. Being asked whether plaintiff was feigning or "making believe," witness answered, "No, sir; I know he did not, from examination and tests." *Held*, that with the explanation as to his means of knowledge, there was no error in admission of evidence. *Chicago Railroad Co. v. Martin*, 483.

10. It does not even require an expert to know existence of pain from nature of injury and patient's outward manifestations. *Id.* See also *Tierney v. Railway Co.*, 669.

11. Directions given to stranger with reference to delivery of baggage, by baggage-master while away from baggage-room of company engaged in transaction of his own private business, are not binding on company. *City v. Raymond*, 212.

12. In prosecutions for assault words uttered during continuance of main

EVIDENCE.

transaction or so soon thereafter as to preclude hypothesis of concoction or premeditation, whether by active or passive party, if relevant, may be proved as any other fact, without calling party who uttered them. *Flynn v. State*, 274.

13. Party cannot call and examine witnesses to support general character of another witness, or himself, as a witness, for truth and veracity, until character of witness has been directly assailed. *Tedens v. Shumers*, 545.

14. That due bill is found in hands of maker is *prima facie* evidence of its payment. *Id.*

15. If plaintiff shows by preponderance of evidence that defendant owes him on due bill, notwithstanding its surrender, defendant must overcome that evidence by a preponderance, to defeat recovery. *Id.*

16. Contradictory declarations of witness, whether oral or in writing, made at another time, cannot be used for purpose of impeachment until witness has been examined upon subject, and his attention particularly directed to the circumstances in such way as to give him full opportunity for explanation or exculpation, if he desires to make it. *The Charles Morgan*, 682.

17. If contradictory declaration is in writing, questions as to its contents, without production of instrument itself, are ordinarily inadmissible. Circumstance may, however, excuse its production. All law requires is that memory of witness be properly refreshed, which court is to determine. *Id.*

18. Where A., desiring to talk over telephone with B., asked operator to call him, and operator thereupon had conversation with B., reporting to A., who was standing by, what B. said as it came over the wire, *held*, in subsequent action between A. and B., former might prove, by himself and others, what operator reported to him as coming from B., operator being called and not remembering conversation. *Sullivan v. Kuykendall*, 442, and note.

19. Fact of mailing letter, properly addressed, with postage prepaid, creates no legal presumption that it was duly received; but is merely to be weighed along with other evidence in determining the question. *Id.*

20. On question of pedigree declarations are admissible: 1. When it appears by evidence *dehors*, that declarant was lawfully related by blood or marriage to person or family whose history the facts concern; 2. That declarant was dead when declarations were tendered, and 3. That they were made *ante litem motam*. Rule applied in determining rightful distributees of intestate's estate, as to declarations of intestate's sister that claimant was natural son of intestate. *Northrop v. Hale*, 143.

21. In course of negotiation for lease, a paper was partly written by defendant and handed to plaintiff, and by him interlined and returned to defendant, which paper was not signed by either of the parties. On trial question was whether terms of lease were those mentioned in paper only, or there were other terms agreed upon outside of it. *Held*, that paper was admissible as part of *res gesta*. *Freeman v. Bartlett*, 747.

22. THE LAW OF JUDICIAL NOTICE, 553.

EXECUTION. See EXEMPTION. JUDICIAL SALE.

1. Merchant tailor, who is head of family and resident, is entitled to exemption of such portion of his stock as he may select up to statutory limit of value; and this right is absolute, and does not depend upon any claim or selection to be made by him. *Rice v. Nolan*, 275.

2. Claim of exemption on morning preceding sale upon order of attachment, is not too late. *Id.*

3. Where stock in trade of debtor is mortgaged, he is entitled to an exemption of his own selection, free of all liability from debt up to full value of \$400. *Id.*

4. Where exempt property of defendant has been levied on by attachment, and a few days before sale thereof defendant makes assignment for benefit of creditors, with no reservation of such exempt property, but no proceedings are taken under such assignment, and where plaintiffs do not claim the property thereunder, and are not influenced or prejudiced thereby, defendant is not estopped as against such plaintiffs from thereafter claiming attached property as exempt. *Id.*

EXECUTORS AND ADMINISTRATORS. See ACTION, 3, 7. CORPSE, 1, 2. FRAUDS, STATUTE OF, 9. REMOVAL OF CAUSES, 6, 8. WITNESS, 4.

1. That same person is both trustee and executor will not enlarge or transfer the powers from one capacity to the other. *Long v. Long*, 212.

2. A. died in Connecticut and letters of administration were taken out there. There were no claims in Rhode Island against estate of A. *Held*, that Connecticut administrator could endorse promissory note due estate of A., so as to enable endorsees to bring suit on note in Rhode Island. *Mackay v. Church*, 683.

3. Promissory notes given to two joint administrators for debt due estate of intestate, may be transferred and endorsed by one of them. *Id.*

4. If administrator of deceased partner has settled with surviving partners, and his account has been allowed by Probate Court, it has no jurisdiction to open account upon petition of administrator's successor, to which surviving partners only are made respondents, on ground that settlement was induced by their fraud. *Blake v. Ward*, 77.

5. When bill in equity was brought by administrator to set aside as fraudulent against creditors conveyances made by deceased, and it did not appear whether administrator held sufficient assets to pay expenses of administration; *Held*, that the bill instead of being dismissed might, if administrator lacked funds to defray expenses of administration, be amended by setting forth this fact and by adding creditors. *Estes v. Howland*, 799.

6. THE POWER OF AN EXECUTOR WITH THE WILL ANNEXED OVER HIS TESTATOR'S REAL ESTATE, 689.

EXEMPTION. See EXECUTION. PARTNERSHIP, 3. PATENT, 2. PENSION, 1.

Insolvent debtor who sells property which is subject to execution, and with proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay or defraud his creditors; but property so purchased does not cease to be exempt. Only remedy of creditors is by attacking sale of non-exempt property. *Comstock v. Bechtel*, 748 and 783, and note.

EXPERT. See EVIDENCE, 7, 8, 10. HIGHWAY, 7.

Non-professional witnesses having sufficient opportunities for observation may give their opinions on question of insanity, having first stated the observed facts. *Boughman v. Boughman*, 77.

EXTRADITION. See CRIMINAL LAW, 11, 12.

FACTOR. See BAILMENT, 2-4. CONTRACT, 5.

FENCE. See FIXTURE, 3. LANDLORD AND TENANT, 1.

FERRY. See CONSTITUTIONAL LAW, 1. NEGLIGENCE, 5.

FIXTURES.

1. Boards in corn barn, used for permanent floor, and stone posts, deposited upon farm for building necessary fences. *Hackett v. Amsden*, 748.

2. Trespass *de bonis* is proper form of action to recover for boards and posts; as claim was not for breaking and entering, but for taking and carrying away. *Id.*

3. Fence built by one person on land of another under parol agreement that it might be removed at will of builder, becomes a fixture which will pass with grant of land to *bona fide* purchaser without notice. *Rowand v. Anderson*, 483.

FOREIGN CORPORATION. See CORPORATION, 30.

FORGERY. See CORPORATION, 29.

FORMER RECOVERY. See HUSBAND AND WIFE, 27.

1. Damage to goods and injury to person, occasioned by one act, give rise to distinct causes of action. *Brunsdan v. Humphrey*, 369 and note.

2. A., claiming to be injured by collision with certain teams left in highway by B., brought action against B. to recover damages. B. obtained judgment. *Held*, that this judgment was bar to subsequent suit against town. *Hill v. Bain*, 683.

FORMER RECOVERY.

3. A. recovered judgment in assumpsit against B. for money loaned; A. afterwards brought case against B. for alleged fraudulent and false statements to obtain loan. *Held*, that judgment in assumpsit could not be pleaded in bar; but that value of judgment in assumpsit was to be considered as *pro tanto* reducing the damages. *Whittier v. Collins*, 799.

4. Plaintiff was owner of certain land, and in 1867 and in 1868, but not afterwards, defendants worked seam of coal lying under and near to plaintiff's land, which subsided in consequence, and the injury was repaired by defendants. In 1882 a second subsidence and injury occurred from same cause. *Held*, that plaintiff was entitled to maintain action for damage done in 1882, and that he was not barred by Statute of Limitations. *Mitchell v. Darley Co.*, 432, and *note*.

FRAUD. See BANKRUPTCY. COMMON CARRIER, 16. CORPORATION, 26, 27, 29. DEBTOR AND CREDITOR, 4, 5. EXECUTORS AND ADMINISTRATORS, 4. HUSBAND AND WIFE, 23, 24. INSURANCE, 26. MORTGAGE, 22. NEGOTIABLE INSTRUMENT, 2. PLEADING, 1. POSSESSION, 2. LIMITATIONS, STATUTE OF, 8. TORT, 6. TROVER, 1. WILL, 11.

1. Party not excused for want of care and prudence in signing contract without reading it, if capable of reading, unless induced to do so by wilfully false statements of party procuring his signature. *Linington v. Strong*, 275.

2. What is negligence in signing contract without reading same is question for jury; it is not proper to select certain facts, and tell jury that they afford no evidence of negligence or want of proper care. *Id.*

3. To support action, false representation need not be addressed directly to plaintiff, if made with intent to influence every person to whom it may be communicated. Not essential that misrepresentation be sole inducement to purchase. *Carvill v. Jacks*, 275.

FRAUDS, STATUTE OF. See CONTRACT, 4. EXECUTORS AND ADMINISTRATORS, 5. EXEMPTION. PARTNERSHIP, 3. SPECIFIC PERFORMANCE, 3.

1. Does not require that all terms of contract shall be agreed to or written down at one time, nor on one piece of paper; but the paper signed must be connected with the other papers by internal evidence. *North v. Merdel*, 143.

2. Parol or simple contracts for sale of growing timber to be cut and severed from land by vendee do not convey any interest in lands, and are not therefore within statute. *Banton v. Shorey*, 799.

3. Doctrine of part performance to take parol contract for sale of land out of statute, does not apply to contracts between tenants in common. *Haines v. McGlone*, 418.

4. Where one tenant in common by parol contract sells his moiety of land to co-tenant, and afterwards repudiates contract and conveys to another purchaser with notice, latter cannot recover in equity except upon return to co-tenant of his purchase-money and half of all taxes and cost of improvements paid by him, and interest. *Id.*

5. When relied upon in defence to action for breach of contract, on ground that it was not to be performed within year, should be pleaded specially. *Farwell v. Tilson*, 143.

6. To defeat application of statute by happening of contingency, it must be such as renders performance of contract possible within year. *Id.*

7. Effect is to be given to oral contract if proved, unless upon whole case it appears affirmatively that it is not to be fully performed within year; it is not sufficient that it may not be. *Id.*

8. In determining question of time of performance of contract, it is proper to consider circumstances and situation of parties, so far as known to each other, and subject-matter of contract. *Id.*

9. Promise of executor to pay \$5000 to one of testator's heirs-at-law, who received nothing under will, in consideration that he would forbear further opposition to probate of will, claimed to have been made through undue influence, is not within statute, and such forbearance is sufficient consideration. *Bellows v. Soules*, 620.

10. G. was refused credit by P.: M., who employed G. at time, told P. to

FRAUDS, STATUTE OF.

let G. have goods, and he would see it paid. The credit was given to M. and was refused to be given to G. *Held*, that M.'s promise was an original undertaking. *Maddox v. Pierce*, 343.

11. Plaintiff's house being mortgaged, he entered into parol contract with defendant to purchase mortgage, sell house, and after satisfying mortgage debt, costs, &c., to pay balance to plaintiff. *Held*, that plaintiff in assumpsit could recover this balance and that contract was not within Statute of Frauds. *McGinnis v. Cook*, 620.

12. REFORMATION IN EQUITY OF CONTRACTS VOID UNDER THE STATUTE OF FRAUDS, 81.

13. VALIDITY OF BONA FIDE VOLUNTARY CONVEYANCES BY SOLVENT DEBTORS, AS AGAINST PRIOR CREDITORS, 489.

GAMBLING. See CRIMINAL LAW, 21.

GARNISHMENT. See ATTACHMENT.

GAS COMPANY. See CORPORATION, 13.

GIFT.

1. To establish gift *causa mortis* evidence must show not only that person *in extremis* distinctly designated thing given and donee, but also that property was presently to pass, and delivery. *Newton v. Snyder*, 418.

2. Delivery to third person for donee, is sufficient; but delivery to agent to perform act or make delivery only after giver's death, would amount to nothing. *Id.*

3. Deed for interest in land, unlike a will, must take effect upon its execution; but it may be good as voluntary settlement, though it be retained by grantor in his possession until his death, when circumstances, aside from retention of deed, do not show grantor did not intend it to operate immediately. *Cline v. Jones*, 418.

GUARANTY.

1. Following letter was held not to create a continuing liability: "Gentlemen: The bearer of this letter, my son-in-law, * * * wishes to place a stock of groceries in his provision and meat store, in this place. To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you." *Knowlton v. Hersey*, 144.

2. In suit upon guaranty of payment of note owned by bank, fact that bank held, before suit, assignment, through trustee, of patent right and some claims for damages for alleged infringement, and was offered more for these than enough to have paid note, such assignment having been made by principal debtor; which patent and claims afterward prove valueless from adverse ruling of courts, will not discharge guarantor, although he may have urged bank to accept offer. It was bank's duty, as trustee, to obtain largest sum that could be realized, and making mistake, while acting in good faith, will not subject bank to loss. *Kaufman v. Loomis*, 144.

GUARDIAN AND WARD.

1. Guardian appointed in one state, of ward domiciled in another, where law of latter is less strict as to investments of a guardian than that of former, will not, in absence of express statutory requirement, be held to the more rigid rules of state of his appointment, when he has faithfully and prudently exercised his discretion. *Lemar v. Micon*, 144.

2. Former guardian of plaintiff's ward pledged to defendant bank to secure his own note two negotiable bonds owned by ward, on which was endorsement tending to show ward's ownership, and which was seen by cashier at time of negotiation. *Held*, 1. That defendant was put upon inquiry, and that it was not sufficient to only inquire of guardian. 2. That plaintiff could recover bonds in action of replevin. 3. That settlement of guardian's account in Probate Court did not affect title to bonds. *Langdon v. Bank*, 620.

HABEAS CORPUS. See CRIMINAL LAW, 5.

HIGHWAYS, STREETS, BRIDGES. See CONSTITUTIONAL LAW, 26, MUNICIPAL CORPORATION, 6, 7. NEGLIGENCE, 1, 3, 6, 12, 36. WAREHOUSE, 105.

HIGHWAYS, STREETS, BRIDGES.

1. Use of street or sidewalk after notice that it is out of repair, is not necessarily negligence. *City v. Schmidling*, 483.

2. In action against city to recover for personal injuries alleged to have resulted from defective sidewalk, fact that walk was removed by city authorities and better one substituted soon after injury occurred, may be considered as circumstance tending to show that walk removed was out of repair, but it is no evidence that city authorities had knowledge of defect before occurrence of injury. *Id.*

3. Owners of bridge across navigable stream must use reasonable diligence to prevent such accumulation of drift about bridge piers, either above or below surface of water, as might endanger navigation. *St. Louis, &c., Railway Co. v. Meese*, 622.

4. Owner of land through or along whose property public highway runs, has absolute right to use portion of same for certain purposes, for temporary period and in reasonable manner, taking care not to expose an object calculated to frighten ordinarily gentle and well trained horses. *Piollet v. Simmers*, 235, and note.

5. Travelling on Sunday cannot be set up as a defence by one sued for an illegal obstruction of a highway. *Id.*

6. Where in such a case plaintiff had proved that other horses had been frightened by the object in question, evidence was admissible to show that these horses were skittish. *Id.*

7. The horse having fallen and died, witnesses familiar with horses may be asked their opinion as to whether the object was calculated to frighten the horse, and whether the mere fall or the fright could have killed him. *Id.*

8. Use of velocipedes upon sidewalk of street not necessarily unlawful. *Purple v. Greenfield*, 484.

9. Opening about foot and half deep, little more than foot in width, and two feet and a half long, was made six inches from line of sidewalk in town, to furnish light and air to a cellar. There was nothing to indicate where line of sidewalk ended. Opening had existed for some months, and was covered by loose board, and was known to be so covered by chairman of selectmen of town. While board was off, traveller stepped into opening. *Held*, that jury were authorized to find that town had reasonable notice of hole, insecurely guarded, near highway. *Id.*

10. Town is not bound to erect barriers to prevent person travelling with horse and wagon from straying from highway, although there is dangerous place 34 feet from marked travelled part of highway, and 9½ feet from line of location of highway, which he may reach by so straying. *Barnes v. Chocopee*, 484.

HOMESTEAD. See CONSTITUTIONAL LAW, 16.

HOMICIDE. See ACTION, 2, 3. CRIMINAL LAW, VIII.

HOUSE OF REFUGE. See CHARITY, 1.

HUSBAND AND WIFE. See ACKNOWLEDGMENT. BANK, 2. BILLS AND NOTES, 8. CRIMINAL LAW, 1. INSURANCE, 17. LIMITATIONS, STATUTE OF, 13. MORTGAGE, 6. PARENT AND CHILD, 3. SURETY, 5. TORT, 4. WITNESS, 4.

I. *Marriage, Divorce, and Alimony.*

1. Guardian of insane woman cannot maintain action against woman's husband for divorce and alimony, or for alimony alone. *Birdsell v. Birdsell*, 481.

2. Articles of separation which contain no express stipulation against divorce, are not *per se* bar to divorce for causes existing prior to execution of articles. *Fosdick v. Fosdick*, 681.

3. That liberal divorce law of Rhode Island influenced petitioner for divorce to come there, does not make him any the less a domiciled inhabitant of state, if he came *bona fide* to reside permanently. *Id.*

4. Widow cannot maintain action against administrator of deceased husband, for fees of her counsel for prosecuting suit against husband for divorce *a mensa et thoro*, pending which suit he died. *McCurley v. Stockbridge*, 344.

HUSBAND AND WIFE.

5. But counsel themselves can maintain such action, if it be made to appear affirmatively that the divorce suit was justifiably instituted. *McCurley v. Stockbridge*, 344.

6. In absence of any statutory prohibition, marriage at common law may be had *per verba futuro cum copula*; but the *copula* must be in fulfilment of the agreement to marry, or in consummation of such contract. For the *copula* to be available, parties must at time have accepted each other as husband and wife. *Stoltz v. Doering*, 545.

7. Any unjustifiable conduct on part of husband which so grievously wounds mental feelings of wife as to seriously impair her health, or such as utterly destroys the legitimate objects of matrimony, constitutes extreme cruelty, although no personal violence is even threatened. *Avery v. Avery*, 276.

8. In 1864 Henry First, resident of Knox County, Ohio, absconded, deserting his wife and children, and nothing was heard of him in that community until 1880. In 1873 land in said county belonging to him in common with others, was partitioned at suit of co-tenants, and his share of proceeds came to custody of Brent, Clerk of Common Pleas. In 1879, with his wife's assent, probate court appointed Bennett administrator of W. H. First, supposing that to be true name of absentee, and he collected from Brent \$174.21, the said share of said proceeds. In October 1880, First demanded said sum from Brent, and brought suit. Held, in absence of showing to contrary, presumption, from facts stated, is that money was paid to wife, who was entitled to a year's support, on supposition that husband was dead; and that, as she was entitled to support out of his property during life, First's conduct estops him from claiming that payment to her was unauthorized. *Brent v. First*, 212.

9. THE RIGHT TO ALIMONY AFTER DIVORCE, 1.

II. *Curtesy and Dower.*

10. Under French law, by marriage without contract as to property, community of property between husband and wife is established as an incident of marriage. During coverture husband has control and management of community property, and he may dispose of his half by will. Will of whole of his property made by husband before marriage will not defeat wife's right. *Harra! v. Harra!*, 344.

11. Person *sui juris* may change his domicile as often as he pleases. Naturalization in adopted country is not necessary. *Id.*

12. To effect change of domicile there must be voluntary and actual change of residence with *animus manendi*. *Id.*

13. By French law marriage of foreigner in France without any contract as to property, followed by establishment of conjugal domicile in France, will subject property of married persons to community law, and government authorization under Article XII. of code is not necessary to establishment of such domicile. *Id.*

14. Husband with conjugal domicile in France was brought to this country in 1878 and sent to hospital for insane in Philadelphia, where he died in 1881. Held, that there was no change of domicile. *Id.*

III. *Separate Estate.* See *infra*, 25, 27, 31-33.

15. Judgment obtained by husband and wife against railway company, for injuries sustained by wife, cannot be attached for debt of husband. *Clark v. Wooten*, 545.

16. Goods purchased by married woman on credit are not her separate property; nor can she acquire title to any property or business upon the credit of its after-production. *Lienbach v. Templin*, 127, and *note*.

17. Where wife claims property as against husband's creditors, she must show affirmatively, that she paid for it with her own separate funds. *Id.*

18. *Feme covert* brought suit for personal tort by her next friend. It appeared on face of declaration that she had husband living. On general demurrer, held, that suit should have been brought in name of husband and wife jointly. *Treusch v. Kamke*, 748.

19. Suit at law will not lie on promise of husband to repay to wife moneys received by him for her during coverture; but will against husband's executors

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on promise made by them officially to pay moneys so received by husband. *Rusling v. Rusling*, 748.

20. Son advanced money to mother for her support, under agreement that he should be repaid at her death out of her estate. Son procured from wife the money advanced, agreeing that she should have account against his mother. Equity will enforce the claim in behalf of wife. *Titus v. Hoogland*, 344.

21. Parol assignment to wife being unknown to mother, counter-claim which she had against son at her death will be set-off against claim of wife. *Id.*

IV. *Torts, Contracts, Conveyances, &c.* See *ante*, 16, 18.

22. Legislation of New Jersey does not give married woman capacity to make legal contract with her husband. *Farmer v. Farmer*, 418.

23. Wife may give her property to her husband, or make contract with him which will be upheld in equity, but courts always examine such transactions with anxious watchfulness and dread of undue influence. *Id.*

24. Where contract is made by parties holding confidential relations, the burden, if contract is assailed, is on stronger party to show no advantage was taken; otherwise fraud will be presumed. *Id.*

25. Contract by which married woman charges her separate estate in equity, need not be in writing. *Elliott v. Lawhead*, 484.

26. Action founded on such contract, where personal judgment against married woman is not authorized, is cognisable only in equity. *Id.*

27. Prior action to recover money judgment, in which it is sought to reach same separate property by attachment, in which plaintiff fails, is no bar to equity suit to charge such separate property. *Id.*

28. Where by statute married woman is given use and disposition of her earnings and property, husband is not responsible for her torts not committed in his presence or by his direction. *Norris v. Corkill*, 135.

29. Under statute empowering married women to carry on any trade or business on her sole and separate account, she is not authorized to become her husband's partner. *Fairlee v. Bloomingdale*, 648, and note.

30. Where married woman, having separate estate or business, employs husband to manage same, and agrees to pay him stated compensation, a chose in action in his favor against her is created, which, on her failure to pay, can be reached by judgment creditor of husband. *Kingman v. Frank*, 469, and note.

31. Married woman who purchases real estate at trustee's sale, made under direction of court of equity, and who only pays part of purchase-money, is personally liable for balance. *Fowler v. Jacob*, 343.

32. Decree in *personam* against *feme covert* for such balance, means only that unless by given time she pays such balance, any of her separate property which she would have right to pledge in order to pay or secure a debt, may be taken in execution to pay what she owes on her purchase. *Id.*

33. Married woman has power to charge her separate property with payment of her debts, and whether she does so or not, is question of intent; which may be shown on face of obligation creating debt, or *alimunde*. *Id.*

34. MARRIED WOMEN TRADERS, 353.

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 13. NEGLIGENCE, 12, 13, 35, 41.

INDIAN. See CONSTITUTIONAL LAW, 18.

INFANT. See COMMON CARRIER, 14, 15. DOMICILE, 2. GUARDIAN AND WARD. NEGLIGENCE, 17. PARENT AND CHILD. WILL, 11.

1. Executed note for horse; before majority rescinded contract, tendered horse to payee (refused) and demanded note. Held, that avoidance and tender annulled contract on both sides *ab initio*. *Hoyt v. Wilkinson*, 683.

2. Deed of infant may be avoided after maturity, by any unequivocal act; a reconveyance to another, not in privacy with first grantee, disaffirms first deed; and this, whether last be quit-claim deed, or deed with covenants of warranty. *Bagley v. Fletcher*, 419.

3. Deed of infant will pass his estate subject to disaffirmance after maturity, but covenants in his deed are absolutely void. *Id.*

INFANT.

4. Infancy of defendant, in action for goods sold and delivered, cannot be proved by affidavit made in chancery suit, to which plaintiff was not a party, court should appoint guardian *ad litem*. And if the guardian fails to properly protect interests of ward, it is duty of court, *sua sponte*, to compel him to do so, whenever fact comes to knowledge of court. Court should see that proper pleadings are made to present infant's defence. *Lloyd v. Kirkwood*, 621.

5. When in court as suitor or defendant, becomes ward of court, whose duty it is to see that his rights are protected. If general guardian fails to appear, court should appoint guardian *ad litem*. And if the guardian fails to properly protect interests of ward, it is duty of court, *sua sponte*, to compel him to do so, whenever fact comes to knowledge of court. Court should see that proper pleadings are made to present infant's defence. *Lloyd v. Kirkwood*, 621.

6. Where bill to establish and enforce resulting trust as against infant heir, showed upon its face that alleged trust arose twenty-five years before suit, and court rendering decree therein against infant failed to require guardian *ad litem* to set up laches in defence, *held*, that court was justified in setting decree aside on bill filed by infant. *Id.*

7. An infant sued by *prochein ami*. Afterwards attorney employed by infant dismissed suit at her request. Motion was subsequently made by *prochein ami* to reinstate case. On appeal from overruling of this motion, *held*, 1. That infant was incompetent to appoint attorney or take any step in suit which could bind her rights. 2. That court below was in error in refusing to reinstate suit. 3. That appeal could be taken from such refusal. 4. That infant, after reaching twenty-one, could not ratify and approve act of her attorney. Where infant sues by *prochein ami*, latter is only person authorized to prosecute suit, and is responsible for costs. While court, after majority of infant, can discharge *prochein ami*, and give infant control of suit, it must make such equitable order as will protect former from costs. *Wainwright v. Wilkinson*, 213.

INJUNCTION. See ACTION, 5. CORPORATION, 9, 10, 22, 23. EQUITY, 13. SCHOOL, 1. WATERS AND WATER-COURSES, 2. WAY, 5.

1. Issued when court has no jurisdiction, void. *Willeford v. State*, 77.

2. May issue to restrain active waste on property in litigation. *Ehardt v. Boaro*, 345.

3. Is proper remedy to prevent collection of taxes by distraint upon railroad property, after tender of payment in tax-receivable coupons. *Allen v. B. & O. Railroad Co.*, 484.

INSANITY. See EVIDENCE, 7, 8. EXPERT. LUNATIC.

INSOLVENCY. See DEBTOR AND CREDITOR, 1. LIS PENDENS.

INSURANCE. See CONFLICT OF LAWS, 2. DAMAGES, 3. EQUITY, 14. MORTGAGE, 7.

I. Life.

1. Assignment of policy to person having no insurable interest, not void. *Mut. Co. v. Allen*, 485.

2. Policy not avoided by omission in application to state slight disorders. *Ins. Co. v. Trust Co.*, 55.

3. Sum insured was by policy payable to wife or legal representatives of assured. *Held*, that wife was entitled to this sum if she survived; if not, his executor or administrator. *Johnson v. Van Epps*, 144.

4. In such case, whatever may be right of assured during lifetime of wife, after her death he will have same power over policy as if it had been originally payable to himself, his executors and administrators. *Id.*

5. Insurance of one's own life for benefit of one not a relative, is not void. But if it were, only insurer can raise question: heirs of insured cannot. *Id.*

6. Although notices issued by insurance company required premiums to be paid at 12 m., on day they fell due, yet where no such stipulation was in policy itself, and, according to course of all previous dealings between it and assured, literal compliance with this requirement had not been exacted, if right to do so existed at all, it was waived, and company could not insist on literal compliance without notice before day of payment. *Ins. Co. v. Gormany*, 145.

7. Where policy provided for payment of premiums annually, and gave assured right to continue insurance, if, after policy had been continued for several years, company improperly refused to receive further premiums or to con-

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tinue insurance, on suit brought therefor by assured, measure of damages was amount of premiums paid with interest. *Ins. Co. v. Germany*, 145.

8. If declaration on policy refers to it without annexing copy, and does not set up contract inconsistent with policy, objection, when policy is offered in evidence, that there is variance between policy and declaration, cannot be maintained. *Pierce v. Ins. Co.*, 545.

9. If declaration on policy, which refers to it, is not demurred to, it is no ground of exception to admission of policy in evidence, that declaration construed in connection with policy is ambiguous. *Id.*

10. Declaration on policy need not allege facts which defeat part of plaintiff's claim under special provisions of policy. *Id.*

11. Policy on life of A. was payable on his death to his wife and children, and their assigns; and if he survived certain day, was payable to him. *Held*, that he had assignable interest therein. *Id.*

12. Policy provided that if assigned, written notice should be given insurer. Assignment was made, and notice given and acknowledged. *Held*, not to amount to promise to pay assignee, and that he could not sue in his own name. *Id.*

13. Policy, in consideration of payment of annual premium, insured life of A. in certain sum, or after due payment of premium for two or more years, in case of default in payment of any subsequent premium, for as many tenth parts of original sum as there should have been complete annual premiums paid. In margin were words and figures denoting that one-half annual premium was payable in cash, and one-half by note. *Held*, that these words and figures formed part of policy, and that, if annual premiums were paid, half cash and half by note, "complete annual premiums" were paid. *Id.*

14. In action at law on policy payable at day named therein, evidence is inadmissible, in defence, to show that different day should have been written. *Id.*

15. In such action plaintiff can recover interest only from date of writ, unless in declaration he alleges demand before that time. *Id.*

16. If policy is payable ninety days after due notice and satisfactory evidence of death of person whose life is insured, or, if he survives certain day, is then payable to him, ninety-day clause has no application to latter contingency, and interest is not payable except as damages for wrongfully withholding the money. *Id.*

17. A. took out policy on his wife's life, payable in four years to her if living and if not living to himself. He paid premiums, retained policy and received payments made upon it. She was living at maturity of policy, but had filed petition for divorce. Statute secured to a married woman and her representatives benefit of all policies not exceeding in aggregate \$10,000, taken out on life any person and expressed to be for her benefit. *Held*, that wife was entitled to amount due on policy. *Ins. Co. v. Mason*, 419.

18. Certificate of membership issued by association organized under provisions of Ohio Revised Statutes. sect. 3630, "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members," which, by its terms, is made payable to the assured, "or any person designated by his will or his heirs, if no person is designated herein or by will," does not authorize such member, by testamentary appointment, to constitute person beneficiary of such insurance, who is not of family of assured, or may not, upon his death, become his heir. *Aia Association v. Genser*, 345.

19. F. took out policy payable to M., his wife, and his children, of whom he had four by former wife. Subsequently child was born to F. and M. Afterwards F. and M. transferred their interest in policy by unsealed instrument, as collateral security for debt of F., and instrument and policy were delivered to creditor. No question was made as to validity of transfer. *Held*, 1st. That policy was executed, irrevocable, voluntary settlement in favor of wife and children in being when it was taken out. 2d. That F. and M. could pledge or assign policy to extent of their interests in it. 3d. Policy being for \$5000, that one-fifth was due to creditor and one-fifth to each of four children. 4th. One of children having died a minor before F., that one-fifth due this child should be paid to his legal representative, if any, and if none, to administrator of F., child's father and next of kin. *Ins. Co. v. Baldwin*, 800.

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20. Y. was member of Mutual Benevolent Association, whose object was to provide and maintain fund for benefit of widows and orphans of deceased members. Its articles provided that upon death of member, secretary should notify each member, who should within thirty days of date of notice pay to secretary \$1.10, and in case of failure to pay, his name should be dropped and he should forfeit all claims upon association; but any member might be reinstated by giving satisfactory excuse himself or through his representative to directors; also that notice directed and sent to post-office address or residence of member as recorded in secretary's books, should be deemed legal notice. On August 29th 1882, notice of two assessments was sent to post-office address of Y. No payment or tender of assessments was made, and Y. died two days after expiration of thirty days. He was taken sick September 13th 1882, and was for most of time between that date and time of his death, delirious and entirely incapable of attending to business. In action by widow, *held*, 1st. That obligation to pay death assessment was personal to member, and in case of his default he ceased to be member, and forfeited all claim upon association. 2d. That receipt of notice need not be proved. 3d. That the sickness did not excuse default. *Yoe v. Mut. Ben. Ass.*, 546.

21. ASSIGNMENTS OF LIFE INSURANCE POLICIES, 753.

II. Fire.

22. Temporary illegal use of property insured, not contemplated at time of taking out policy would only vitiate it during time of such illegal use, even if policy is by its terms to become "void," in case of such illegal use; and when that stopped it would revive. *Hinckley v. Ins. Co.*, 770, and *note*.

23. Absolute condition in policy on dwelling-house that policy shall be void if building "be vacated or left unoccupied" avoids policy, although vacation results from permanent removal of tenant of insured during running of lease, without knowledge or consent of landlord. *Furners' Co. v. Wells*, 485.

24. Absence at time of loss and failure to return in time is sufficient legal excuse for assured's not furnishing proofs of loss, within thirty days thereafter, signed and sworn to by him, as required by policy; in such case proofs may be signed and verified by agent having charge of his business. *German Co. v. Grunert*, 485.

25. In such case where notice and proofs were furnished within required time by the agent, and company returns same with objections, and they are amended, and afterwards sent back for amendment, several times, this will be held waiver by company of objection that such notice and proofs were not delivered in proper time. *Id.*

26. Where policy provides that any false swearing or attempt at fraud, "or if there shall appear any fraud in the claim, by false swearing or otherwise," shall avoid such policy, company, in order to avail itself of the defence, must show that assured *knowingly* swore falsely or said or did that which is claimed to be fraudulent. *Ins. Co. v. Grehan*, 345.

27. Policy reserved to insurer right to repair or rebuild upon notice of such intention within 90 days after proof of loss. After such proof insurer served notice of such intention "acting jointly with other insurance companies claiming to be interested." There were ten policies in as many companies, eight of which served like notices. Before time to rebuild expired, but while insurers were taking steps for that purpose, plaintiff compromised with all of the eight except defendant for amount of money in aggregate much less than amount of these policies. Defendant's policy provided that assured should not recover of company in greater proportion of loss or damage than amount thereby insured bears to whole sum insured on said property, without reference to solvency or liability of other companies. *Held*, 1. That liability of defendant was several, and that service of above notice converted respective policies from contracts for money indemnity into contracts of indemnity payable in repairing or rebuilding to be performed in time named in policy, but if no time is specified then within reasonable time. 2. That after policy had been thus converted into building contract, insured might settle with some of companies without releasing others from their proportionate share of loss. 3. That such proportionate share was

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to be ascertained without regard to settlement by or insolvency or non-liability of other companies. *Good v. Ins. Co.*, 800.

INTEREST. See **APPORTIONMENT**. **ATTORNEY**, 2. **INSURANCE**, 15, 16. **USURY**.

1. Receipt of, in advance upon overdue promissory note, from maker, does not of itself import such giving of time as will discharge surety. *Haydensville Bank v. Parsons*, 479.

2. Payments and endorsement of payments, upon promissory note in which no rate of interest is expressed, of interest at seven per cent., in respect of time after note has become overdue, do not amount to change of contract, or satisfy statutory requirement of agreement in writing to bind maker to pay that rate in future. *Id.*

INTERNATIONAL LAW. See **CRIMINAL LAW**, 10-12.

1. Treaty is primarily compact between independent nations, depending for its enforcement on their honor and interests. Its infraction becomes subject of international reclamation and negotiation, which may lead to war. With this courts have nothing to do. *Head v. Money Cases*, 213.

2. But treaty may also confer private rights on citizens or subjects of contracting parties enforceable in court of justice. United States Constitution makes treaty, while in force, part of supreme law of land; but in this respect, so far as provisions of treaty can become subject of judicial cognisance in courts of country, they are subject to such acts as Congress may pass for their enforcement, modification or repeal. *Id.*

INTOXICATING LIQUORS. See **CONSTITUTIONAL LAW**, 22. **CRIMINAL LAW**, 3.

1. At trial of one indicted for keeping liquor nuisance, it is not error to refuse to allow juror to be asked on his *voire dire* whether he has contributed money for prosecution of persons generally who are charged with keeping such nuisances. *State v. Hoxsie*, 797.

2. If club of men buy and own in common liquors, to be delivered by their steward only to actual members upon receipt of checks previously obtained from him at five cents each, such delivery, *bona fide* made, is not illegal, and he is not indictable for unlawfully keeping liquors with intent to sell. *Commonwealth v. Pomphret*, 65.

JUDGMENT. See **ACTION**, 5, 9. **CORPORATION**, 5-7, 21. **COURT. ERRORS AND APPEALS**, 4. **EVIDENCE**, 2. **MORTGAGE**, 18. **SET-OFF**, 1, 3.

1. Action can be maintained on domestic, although in full force, and time within which execution can issue has not expired. *Hummer v. Lamphear*, 41, and note.

2. Where circuit court adjourned over thirty-two days, it was held that period intervening in which court did not transact business was to be regarded as vacation, within meaning of that word in sect. 66, of Illinois Practice Act, authorizing judgments by confession in vacation. But the word is not to be understood as embracing all the time court is not actually in session, or as embracing time of adjournment from day to day. *Conkling v. Ridgely*, 485.

JUDICIAL SALE. See **DEBTOR AND CREDITOR**, 4. **UNITED STATES**, 4.

1. Execution on judgment pending appeal is irregular, but not void; sale of land thereon, if not set aside on motion by defendant, made in proper time, will pass his title. *Shirk v. Road Co.*, 145.

2. Defendant only, not those acquiring title from or through him, can question validity of sale of land under execution for irregularity; especially in collateral proceeding. *Id.*

JURISDICTION. See **REMOVAL OF CAUSES**, 7. **UNITED STATES COURTS**, 4.

Objection to, may be raised at any stage of proceedings by motion to dismiss. *Nile v. Howe*, 680.

JUROR AND JURY. See **CRIMINAL LAW**, 15. **TRIAL**, 2, 5.

LANDLORD AND TENANT. See **INSURANCE**, 23. **NUISANCE.** **TENANTS IN COMMON**, 2. **TRESPASS**, 1.

1. It is duty of farm tenant by force of law to make all needed current repairs on fences, and action cannot be maintained against landlord by adjoining land owner, whose colt escaped through insufficient division fence, although fence was in same condition at time of accident as when tenant went into possession. *Blood v. Spaulding*, 683.

2. Lessee of room in block covenanted to keep premises in good and constant repair. Building was thereafter erected on adjoining vacant lot by owner thereof, not the lessor, whereby demised premises were, to great extent, cut off from light and ventilation, and rendered damp and unhealthy, but were capable of being made tenantable by repairs. *Held*, that lessee was not authorized to abandon lease. *Hilliard v. Gas Coal Co.*, 621.

LARCENY. See **CRIMINAL LAW**, VII.

LEASE. See **DEBTOR AND CREDITOR**, 2. **EVIDENCE**, 21. **LANDLORD AND TENANT.**

LEGACY. See **WILL**, 11.

LIBEL. See **SLANDER AND LIBEL.**

LICENSE. See **MUNICIPAL CORPORATION**, 1, 2. **WAY**, 4, 5.

Granted to two or more persons to keep billiard or pool table, or bowling alley, for hire, is available to each. *Hinckley v. Ins. Co.*, 770.

LIEN. See **BANK**, 1. **MORTGAGE**, 3, 4. **RAILROAD**, 6, 7. **SHIPPING.**

LIFE TENANT. See **POSSESSION**, 1.

Testator devised residue of his estate to his wife in trust for herself for life, with remainder over. Just before his death he entered into copartnership, which was to continue for three years, even in case of his death. *Held*, that profits derived from testator's share in partnership belonged to life tenant as income. *Heighe v. Littig*, 801.

LIMITATIONS, STATUTE OF. See **EJECTMENT**, 2. **FORMER RECOVERY**, 4. **MUNICIPAL CORPORATION**, 7.

1. Law of state in which suit is brought determines bar of statute, although cause of action originated in another state. *Stirling v. Winter*, 213.

2. Statute of Vermont not a defence when cause of action accrued in another state, unless both parties resided there at that time. *Troll v. Hanauer*, 622.

3. Maintaining nuisance for twenty years does not give prescriptive right. *New Salem v. Eagle Mill*, 485.

4. Action by person who suffers peculiar damage from public nuisance, may be maintained against person continuing it, although recovery for injury done by creation of nuisance is barred by statute. *Id.*

5. Mutual account is one based on course of dealing, wherein each party has given credit to the other, on faith of indebtedness to him. If the items on one side are mere payments, the account is not mutual. *Gunn v. Gunn*, 346.

6. In case of mutual accounts statute does not begin to run until last just item in account on either side. *Id.*

7. Doctrine of mutual accounts stated. Such a course of dealing may be terminated by either party at any time by anything plainly showing determination to deal no longer that way. *Id.*

8. If person takes possession of land which he knows does not belong to him or anyone from whom he purchases, no prescription will run in his favor, however long he may hold possession. *Cowart v. Young*, 346.

9. A. transferred to B. certain corporate stock, which B. held as chattel mortgage. After default by A. and after B. had subsequent to such default held and treated the stock as his own for more than six years, A. filed bill in equity to redeem. *Held*, that bill could not be sustained. *Greene v. Dispeau*, 419.

10. Every continuance of a nuisance is a renewal of the wrong, and is actionable, until abated. It is nuisance to keep up sewer which, when it rains, throws upon lot and near owner's residence, excrement bad-smelling and hurtful to health. *Reid v. Atlanta*, 346.

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11. To remove bar of statute an acknowledgment of a subsisting debt must be *unqualified*; and if the acknowledgment be coupled with qualified or conditional promise, there must be proof that the condition has been performed, or the event happened, by which the promise is qualified. *Parker v. Butterworth*, 77.

12. Payment on account by one joint promisor will not remove bar of statute as against co-promisor in whose favor statute had attached when payment was made. *Id.*

13. Acts constituting real and personal property of married woman her separate estate and authorizing her to sue and be sued alone, *held*, not to repeal by implication saving clause in statute securing to married women right to maintain actions within respective times limited after such disability is removed. *Ashley v. Rockwell*, 801.

14. Statute should begin to run against action for malicious prosecution of civil suit from time civil suit terminates, by analogy to action for malicious prosecution of criminal suit, except in cases of seizure of personalty under execution, where litigation is protracted by claim of person whose property is seized, when action accrues and statute begins to run at time of seizure. *Printup v. Smith*, 146.

LIS PENDENS. See NOTICE, 3.

While proceedings were pending against A. and B., co-partners, for appointment of receiver under proceedings in insolvency, A. made an assignment of his individual property to C. *Held*, that receiver was entitled to order upon A. and C. for conveyance of assigned property. *Petition of Arnold*, 801.

LUNATIC. See HUSBAND AND WIFE, 1. INSANITY.

MALICIOUS PROSECUTION. See ACTION, 9. LIMITATIONS, STATUTE OF, 14.

1. Action for, in obtaining and levying order of attachment upon personal property, may be maintained against corporation. *Western Co. v. Wilmarth*, 486.

2. In such action where it is alleged in petition that stock of goods was levied on the attachment and withheld from owner for about two months, and thereby his business completely broken up, it is not error to receive evidence showing value of stock; that owner was doing business from \$6000 to \$7000 per annum, with net profit of \$1500 to \$1600 per year, and that on account of attachment proceedings his business was broken up, as in such case exemplary damages are allowable. *Id.*

3. Action for damages does not lie for arrest upon civil process of witness (without writ of protection) returning home from court. Remedy consists in application for discharge; most expedient mode being by summary motion. *Smith v. Jones*, 78.

4. Person ordering such arrest of witness may be punished for contempt. *Id.*

5. Person who has procured arrest and imprisonment of another on lawful warrant is not liable to action for false imprisonment, although his object was to enforce payment of debt. *Mullen v. Brown*, 547.

6. Action for false arrest does not lie against officer for serving precept issued by inferior magistrate, if magistrate has jurisdiction of offence alleged, and precept indicates a proper cause. Amendable irregularities do not vitiate. To render officer liable precept must be absolutely void. *Elsemore v. Longfellow*, 146.

7. Judicial finding in first action in favor of defendant in malicious prosecution suit, and against other party, by court of original jurisdiction, is conclusive of probable cause, when not procured by unfair means, even if reversed on appeal. *Welch v. Railroad*, 420.

8. Where defendant claims that he acted under advice of counsel, it is for jury to say whether the attorney consulted being the attorney in civil suit to recover of plaintiff the sum alleged in criminal proceeding to have been embezzled, was therefore an improper person to consult. *Watt v. Corey*, 78.

MANDAMUS. See TELEPHONE, 1, 3.

1. Right to writ of, to enforce performance of official act by public officer depends upon his legal duty and not upon his doubts. *State v. Turpen*, 622.

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2. Will not issue to inferior court to compel it to conform its judgment to finding in case, when motion to amend judgment in that particular has been entertained, and refused because court was of opinion that judgment had been correctly recorded. *Ex parte Morgan*, 420.

3. Where duty rests upon railroad company to construct viaduct over its tracks at crossing of public street in city, mandamus will ordinarily lie; and the action may in some cases be prosecuted in name of state by county attorney. *State v. Railroad*, 276.

MARRIAGE. See **HUSBAND AND WIFE**, I.**MASTER AND SERVANT.** See **CHARITY**, 1. **CORPORATION**, 18, 19. **MUNICIPAL CORPORATION**, 8. **NEGLIGENCE**, 41. **PARENT AND CHILD**, 4. **TORT**, 4. **TRUST AND TRUSTEE**, 4.

1. Master and mate of vessel are fellow-servants. *Mathews v. Case*, 146.

2. So, also, are foreman and laborers engaged in repairing dam for log-driving company. *Doughty v. Penobscot Co.*, 146.

3. Train despatcher not fellow-servant with employees in charge of train. *Darrigan v. Railroad*, 452, and note.

4. It is duty of railroad company to devise some suitable and safe method of running special trains, so as to avoid collision, and where method employed is to have trains controlled by train despatcher, latter as to employees in charge of train stands in place of company. *Id.*

5. Conductor of railway train not fellow-servant of engineer, but represents company. *Chicago, &c., Railway Co. v. Ross*, 94, and note. See *infra*, 8, 10, and 11.

6. Liability of master for injury to servant, generally. *Id.*, note.

7. Where person placed his mare at livery, and instructed servant of proprietors of stable to take her out for exercise, such, however, being no part of the contract of livery, and while the servant had her out for such purpose, she died, proprietors of stable cannot be held liable to owner, though mare died in consequence of immoderate riding and carelessness of their servant. *Adams v. Cost*, 346.

8. Head blacksmith of railway company was directed with other employees to go on wrecking train to certain place to remove wreck. Train was under charge of engineer, who acted also as conductor, and by his negligence train collided with another, and blacksmith was killed. *Held*, that they, as well as the other employees on train, were fellow-servants. *Abend v. Railroad Co.*, 277. See *ante*, 5.

9. On single track street railroad north-bound car ran beyond its side track, and passenger at request of driver, assisted in pushing it back. While so engaged, and without fault, he was injured by carelessness of driver on south-bound car. *Held*, 1. Plaintiff did not engage in service of company as mere volunteer.

2. Under circumstances he cannot be considered as fellow-servant with driver of south-bound car. *McIntire Rd. v. Bolton*, 486.

10. Car inspectors and yard hand are not fellow-servants; and railway company is responsible for negligence of former by which latter is injured, being bound to use reasonable diligence to keep machinery and instrumentalities for its employees suitable and safe. *Tierney v. Railway Co.*, 669. See *ante*, 5.

11. In such case it will not be presumed that plaintiff assumed risk of negligent inspection, unless it appear that he undertook to handle cars in course of his employment without reference to inspection. *Id.*

12. Railroad corporation is liable to employee for injury occasioned by being struck by bridge-guard, if guard is out of its proper position because of wearing out of rope attached to guard, and corporation has not made suitable provision to have notice of, and to remedy, defects liable to be occasioned by its use. *Warden v. Railroad Co.*, 277.

13. One who contracts with mining company to break down rock and ore for certain distance to disclose vein, at stipulated price per foot, company to furnish steam drill and keep drift clear of rock, as the contractor broke it down, is to be regarded as contractor with and not servant of company. He is not fellow-

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servant of superintendent of company under whose direction work is performed. *Mayhew v. Sullivan Co.*, 146.

14. Passenger in hired coach may, by words or conduct at the time, so sanction or encourage special act of rash or careless driving as to debar him from suit against third person for injury resulting from co-operating negligence of both parties, or make him responsible for injury done by driver. But the negligence of the driver, without some co-operating negligence on his part, cannot be imputed to passenger. *N. Y., L. E. & W. Co. v. Steinbrenner*, 684.

15. In action by workman against employer, for personal injuries caused by fall of staging upon which he was at work, it was in dispute whether defendant undertook to furnish staging as a whole, or whether he undertook merely to provide, and did provide, materials from which fellow-servants of workman erected staging. Judge instructed jury that master is liable to servant for injuries resulting from defective materials negligently furnished by him, although negligence of fellow-servant contributes to accident, and on question whether obligation of master extended to furnishing of staging as completed structure, read and affirmed on their respective theories the instructions requested by each party. *Held*, that plaintiff had no ground of exception. *Clark v. Soule*, 276.

MECHANICS' LIEN. See **UNITED STATES**, 4, 5.

1. Ordinary mechanics' lien laws should not be interpreted as giving a lien upon roadway, bridges or other property of railroad company that may be essential in operation and maintenance of its road. *Commissioners v. Toomey*, 547.

2. Is purely statutory remedy and while courts construe laws liberally and allow proper amendments, yet all proceedings must be in substantial accord with main requirements of statute. *Kenly v. Sisters of Charity*, 802.

MERGER. See **SET-OFF**, 3.**MINES AND MINING.**

1. One member of mining partnership has right, without consulting his associates, to sell his interest in partnership to stranger, and such sale does not dissolve partnership. *Bissell v. Foss*, 420.

2. Discoverers of lode or vein posted at point of discovery plain sign, body of which was: "We, the undersigned, claim 1500 feet on this mineral-bearing lode, vein or deposit." *Held*, that this meant 750 feet on course of lode in each direction from that point, and that notice was not deficient. *Erhardt v. Boaro*, 347.

3. Grant of patent by United States for land located or claimed for valuable deposits, is a determination binding on rival claimant, whether he asserts his claim or not; and if patent includes that part of rival's claim wherein was situated his discovery shaft, where all his labor was done, his whole location falls. *Guillim v. Donnellson*, 684.

MINOR. See **INFANT. GUARDIAN AND WARD. PARENT AND CHILD.****MISREPRESENTATION.** See **FRAUD**, 3. **EQUITY**, 21.**MISTAKE.** See **EQUITY**, 2, 14.**MORTGAGE.** See **ASSIGNMENT**, 3-5, 10, 11. **BAILMENT**, 5. **BILLS AND NOTES**, 8, 10. **CORPORATION**, 5, 6, 20. **NOTICE**, 1, 5. **RAILROAD**, 6, 7. **RECEIVER**, 1. **SALE**, 2. **TAX AND TAXATION**, 1. **USURY**, 1.**I. Generally.**

1. Deposit of, for record, in recorder's office, sufficient to protect mortgagee. *Case v. Hargadine*, 78.

2. Where possession is held by mortgagee adversely to mortgagor, principles of account are quite different from what they are when possession is held in acknowledged character of mortgagee, and are applied with more or less rigor against wrongdoer, according to circumstances. *Booth v. Packet Co.*, 548.

3. Presumption is that mortgage first recorded is first lien; to overcome

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such presumption, it must be proved that the mortgagee, at or before time he took his mortgage, had knowledge of the mortgage first in date. *Hendrickson v. Woolley*, 347.

4. And if mortgagee of mortgage first in date has agreed with mortgagor to keep his mortgage off record, in order that mortgagor may borrow more money on the property to be secured prior to such mortgage, and such agreement be made known to mortgagee of mortgage second in date, but first of record, at or before its execution, priority of mortgage first in date is waived. *Id.*

5. Where senior mortgagee forecloses his mortgage, and sells property, without making junior mortgagee a party, or giving him notice, purchaser, whether senior mortgagee or stranger, acquires his title subject to right of redemption by junior mortgagee; and same rule applies where junior mortgagee has assigned all his interest in mortgage and the notes secured thereby, to third person. *Holliger v. Bates*, 802.

6. Married woman mortgaged her property to secure note of husband given to raise money to pay debt of lumber company, of which he was president. The money was raised by loan from insurance company on note of lumber company at one year, with the mortgage as collateral, and insurance company had knowledge that mortgaged property was designed by mortgagor to serve as surety for payment of loan. Without mortgagor's knowledge or consent, note of lumber company at end of year was renewed, and soon thereafter surrendered, and a new note, with other and different parties, was substituted, and twice renewed, and then extended. *Held*, that mortgage was released. *People's Ins. Co. v. McDonnell*, 213.

II. Chattels.

7. Mortgagee of chattels which are insured by policy providing that loss shall be payable to him as his interest may appear, is entitled to insurance money to amount of mortgage debt, as against creditors of mortgagor garnishing insurance company after loss, although mortgage was not properly filed. *Mawson v. Ins. Co.*, 749.

8. Where domestic animals are mortgaged during period of gestation, offspring when born will, as between parties, be covered by mortgage; but not as against *bona fide* purchaser or encumbrancer, without notice of facts and after period of nurture has passed. *Funk v. Paul*, 749.

9. One who takes mortgage of chattels to secure pre-existing debt which is not yet due is not entitled to protection as *bona fide* purchaser or encumbrancer. *Id.*

10. Description of property as "Forty-one Berkshire hogs, and sixty-five grain sacks," is not so uncertain as to invalidate mortgage. *Knapp v. Deitz*, 748.

11. Mortgage of chattels furnished by mortgagee to mortgagor and to be used and consumed by him for benefit of mortgagee, is not void as to creditors of mortgagor. *Id.*

12. Mode of alienation of personal property is governed by law of place where owner resides, and where property is situated, and is not affected by rule requiring change of possession; thus chattel mortgage executed in New York, and valid there, is valid in Vermont when owner goes into latter state with property. *Norris v. Soules*, 685.

13. After breach of condition mortgagor has no attachable interest in the property. *Id.*

III. Of Realty.

14. Failure to index mortgage which is recorded will not affect its lien or validity. *Barrett v. Prentiss*, 685.

15. Payment by mortgagor after he had sold and quit possession, rebuts presumption of payment arising from lapse of time, not only as to him, but his grantees affected with constructive notice of mortgage. *Id.*

16. One who sells property and concurrently takes purchase-money mortgage, retains such interest therein as may be taken in equity and applied on debt secured by unrecorded mortgage given by vendor. *Association v. Clark*, 802.

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17. Purchaser from mortgagor of lands encumbered by unrecorded mortgage, takes title free from such encumbrance, even if he has full knowledge and notice of its existence, and that it is unpaid. *Association v. Clark*, 802.

18. If creditor procures judgment against such purchaser after such unrecorded mortgage has been recorded, his lien is valid as against such mortgage *Id.*

19. Where money is loaned upon forged mortgage supposed to be valid, for purpose of discharging prior valid mortgage, which is done, mortgagee of void mortgage or his innocent vendee in regular course of business, may be subrogated to rights of prior mortgagee, there being intervening liens. *Everston v. Bank*, 487.

20. If owner of land subject to two mortgages made by predecessors in title, conveys it, reserving easement therein, to first mortgagee, by warranty deed, in which grantee assumes both mortgages, first mortgage is extinguished, and second mortgagee may maintain writ of entry against first mortgagee to foreclose second mortgage. *Kneeland v. Moore*, 548.

21. Where sale of land is made, separate portions of which are subject to separate mortgages, and vendee, as part of price, assumes payment thereof, and subsequently vendor is compelled to pay one of them, vendee cannot maintain bill against vendor to redeem land from such mortgage without also paying the other mortgage. *Wells v. Tucker*, 536.

22. Vendor executed release of his purchase-money mortgage, and took second mortgage for balance unpaid. Release and second mortgage were intrusted to vendee to record; vendee recorded release but not the second mortgage, which was returned to vendor, and by him recorded, after another mortgage made after the second mortgage without consideration, had been recorded and assigned to *bona fide* purchaser without notice. *Held*, that last mortgage was first lien. *Ramsey v. Jones*, 622.

23. Purchaser of mortgaged premises from mortgagor, who assumes payment of mortgage debt, or who knowingly accepts conveyance reciting his assumption of same, will at once become personally responsible to mortgagee, and a release from mortgagor will not avail him. *Bay v. Williams*, 486.

24. Acceptance of conveyance of mortgagor's equity of redemption, is sufficient consideration for promise by grantee to assume and pay mortgage debt. *Id.*

25. Express assent of beneficiary is not essential to his right to avail himself of promise by one, upon valuable consideration moving from another, to pay debt of that other to third person. *Id.*

MUNICIPAL CORPORATION. See ACTION, 16, 17. CONSTITUTIONAL LAW, 12, 13, 19-22, 30, 33. CONTRACT, 1. HIGHWAYS, &c., 2, 9, 10. NEGLIGENCE, 1, 6, 12. OFFICER, 1, 2. TAX AND TAXATION, 5, 6. WILL, 7, 8.

I. Generally.

1. Power to regulate wagons, drays, &c., conferred by Ark. Mun. Corp. Act of March 9, 1875, includes power to license. *Fort Smith v. Ayers*, 78.

2. Such license fee, when imposed as mere police regulation, is not a tax upon an occupation; if so large as to have been manifestly imposed for revenue, it is, in effect, a tax, and not within statute. *Id.*

3. Common council of city, made by charter sole judge of election and qualifications of its own members, having once investigated and seated a member, cannot at subsequent meeting order second investigation. *State v. City*, 749.

4. Shade trees on sidewalks and streets of city belong to it, and in grading streets and sidewalks, may be removed if necessary; and adjoining property owner certainly cannot recover therefor unless damage was caused by negligence in the work. *Castleberry v. Atlanta*, 348.

5. City which undertakes celebration of holiday, under authority of statute providing that city council may appropriate money for such purpose, exclusively for gratuitous amusement of public, is not liable for negligence of its servants in discharging fireworks for purposes of celebration. *Findley v. City*, 214.

6. Board of county commissioners is proper party to bring action to reimburse county for expense incurred by such board in rebuilding bridge upon

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county road within limits of village, which bridge had been injured by railroad company in construction of its road. *Commissioners v. Railroad Co.*, 802.

7. Statute of Limitations does not begin to run against such action until complete restoration of bridge. *Id.*

8. Foreman of engine company in fire department of Baltimore was dismissed by fire commissioners for disrespect to superiors. In action against city to recovery salary since dismissal, *held*, that defendant could not be held responsible for determination of commissioners; and that their right of removal being absolute, if there were no arrears of salary at time of dismissal, any wrong done by commissioners must be redressed by action against them. *Baltimore v. O'Neill*, 803.

9. In relation to powers and privileges which are to be exercised by municipal corporation for improvement of territory within corporate limits, and as to which pecuniary and proprietary interests of individuals are represented, liability of corporation for negligence is largely, if not entirely, measured by liability of individuals for similar acts; but with respect to police powers, such as suppressing riots and unlawful assemblages, such corporation is, in absence of statutory provision to contrary, agent of state, and not liable for failure to perform or negligence in performing duties in that particular imposed by statute. *Robinson v. Greenville*, 347.

10. May acquire realty by possession and for other than municipal purposes. *New Shoreham v. Ball*, 420.

11. In ejectment wherein plaintiff's title rested on possession for more than twenty years, the *locus* was a long sandy waste along the seashore, and defendants were mere intruders. Plaintiff, a municipal corporation, had by vote let the *locus* year by year from 1829 to 1875. Court instructed jury that to show title town must prove open, adverse, actual and exclusive possession for twenty continuous years, and that the votes were not sufficient unless lessees took actual possession, though town need not show that possession of its lessees was continuous in sense of their being on premises all the time, and that if lessees were in possession of any part of *locus* under the votes, it might be considered they were in possession of whole. *Held*, that instructions did not entitle defendants to new trial; and that passage over *locus* by inhabitants of town to get seaweed or sand, or use of same for temporary deposit of seaweed, would not amount to interruption of possession. *Id.*

12. There being evidence to show that *locus* was known as the East Beach, *held*, that it was for jury to determine whether or not town let *locus* by name of the East Beach. *Id.*

II. Bonds of.

13. Municipal bond issued under authority of law for payment, at all events, to named person or order, of fixed sum of money at designated time therein limited, being endorsed in blank, is negotiable security, and its negotiability is not affected by provision of statute under which it was issued that it should be "payable at the pleasure of the district at any time before due." *Ackley School District v. Hall*, 277.

14. Consistently with Act of March 3, 1875, determining jurisdiction of United States Circuit Courts, the holder may sue therein without reference to citizenship of any prior holder, and unaffected by circumstance that municipality may be entitled to make defence based upon equities between original parties. *Id.*

15. By city charter its council had power to levy taxes on all property within city "to pay the debts and meet the general expenses of said city, not exceeding fifty cents on each one hundred dollars per annum on the annual assessed value thereof." Subsequently the city was authorized to subscribe to capital stock of railroad, and issued bonds in payment of stock it subscribed for. *Held*, that authority to make the subscription carried with it right and duty to levy and collect special tax, if necessary to pay subscription. *Quincy v. Jackson*, 347.

MUTUAL BENEFIT ASSOCIATION. See **INSURANCE**, 20.

NATIONAL BANK. See **UNITED STATES COURTS**, 4.

That taxation of shares of, imposed by authority of state within which association is located, is no heavier than that imposed upon state bank shares, or state saving institutions, does not prevent its being an illegal discrimination, under sect. 5219 of Rev. Stat., if it results in capital so invested not being upon same footing of substantial equality in respect of taxation by state authority as other moneyed capital in hands of individual citizens, however invested. *Boyer v. Boyer*, 348.

NATURALIZATION. See **HUSBAND AND WIFE**, 11.

NAVIGABLE STREAM. See **CONSTITUTIONAL LAW**, 26. **HIGHWAYS, &c.**, 3.

NE EXEAT. See **EQUITY**, 22.

NEGLIGENCE. See **ACTION**, 4, 7, 23. **ATTORNEY**, 1. **BANK**, 4. **COMMON CARRIER**, 7, 12, 17, 19-21. **FORMER RECOVERY**, 2. **FRAUD**, 1, 2. **HIGHWAYS, &c.** **MASTER AND SERVANT.** **MUNICIPAL CORPORATION**, 4, 5, 9. **PARENT AND CHILD**, 4. **RAILROAD**, 2-7. **TELEGRAPH.**

1. A town is not required to render way passable for entire width of located limits. *Morse v. Belfast*, 803.

2. In determining whether way is safe and convenient within statute, it is enough that it is so in view of such casualties as might reasonably be expected to happen to travellers. What imperfections will render town liable is generally for jury. *Id.*

3. In action for personal injuries received by reason of defect in way question, whether plaintiff or driver was in exercise of ordinary care, is for jury. *Id.*

4. Failure to look or listen on crossing railway track will bar recovery, notwithstanding negligence of railroad company in failing to give signals. *Union Pac. Railroad v. Adams*, 487.

5. Person who, in passing from ferryboat to dock, puts himself in so dense a crowd that he cannot see his footing, and gets his foot crushed between boat and dock, has no cause of action against ferry company. *Dwyer v. Railway Co.*, 749.

6. When injury results to traveller on highway from combination of two causes, one defect in highway and other a natural cause or pure accident (ice), town is liable; provided, injury would not have been sustained but for defect in highway. *Hampson v. Taylor*, 685.

7. In action for personal injuries received by collision at railroad crossing, evidence will not be received to show general character and habits of traveller for carefulness, though injuries occasioned death before he could tell how accident happened, and no one saw him at time of collision. *Chase v. Railroad Co.*, 803.

8. In such case natural instinct for self-preservation does not afford proof of absence of contributory negligence, though it may give force to facts already proved. *Id.*

9. For injury resulting from fall into sidewalk of public street, communicating with cellar of adjoining building, and left without guard or notice of danger, owner and occupier of premises is liable. *Houston v. Traphagen*, 749.

10. Where it appeared that injured person stepped into unguarded opening while his attention was attracted by objects in shop window above opening, contributory negligence is not necessarily inferred. *Id.*

11. Where it is claimed that fall produced or excited disease, it should appear, not only that fall was possible cause of disease, but other causes should be so excluded and circumstances should be such as to leave reasonable inference that fall was actual cause. *Id.* See *infra*, 40.

12. Where city contracted for construction of cistern in street, and before its completion horse fell into it and was killed for want of sufficient protection around and over excavation, *Held*, that city was liable, although it only reserved right to see that work was done according to specifications. *City v. Nending*, 214.

13. Contractor entered into written contract with trustees of estate to take down an entire building belonging to said trustees, "or so much thereof as the trustees may request." "All of said work to be done carefully, and under the

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direction and subject to the approval of the trustees." *Held*, that he was not an independent contractor. *Linnehan v. Rollins*, 214.

14. In Maine in actions against railroad companies for injuries to persons, whether in form civil or criminal, burden is upon party prosecuting to show absence of contributory negligence. *State v. Main Co.*, 147.

15. One in full possession of his faculties, who undertakes to cross railroad track at moment train is passing, or when train is so near that he is not only liable to be, but is in fact struck by it, is *prima facie* guilty of negligence. *Id.*

16. In prosecution by indictment, against railroad company for negligently causing death of person at crossing, the amount of forfeiture between minimum and maximum sums fixed by statute, should be assessed by jury. *Id.*

17. Minor child, who being *sui juris* as to reasonable care of her person and safety, lawfully and properly enters into conveyance driven by her parent, and without fault on her part is injured by negligence of driver of another vehicle, is not prevented from recovering damages because her parent has, by his negligence, contributed to injury. *Railway Co. v. Eadie*, 706, and note.

18. If track of railroad company is put in position where trains, when close to their transit over public street or road cannot be seen, that is an extra danger calling for more than ordinary cautionary signals; merely ringing bell not sufficient. *Railroad v. Randel*, 686.

19. Where traveller was crossing in wagon, at such a place, and flagman did not notify him of coming of train until after it had begun to cross tracks, and traveller then misunderstood warning and went forward when he ought to have retreated, *Held*, that such misunderstanding should not be imputed to him as negligence. *Id.*

20. It is duty of person about to cross railroad track, to approach cautiously, and endeavor to ascertain if there is present danger in crossing; and when track and crossing are so situated, that approach of train cannot be seen, it may be duty of person about to cross, to stop and look for train. *Pennsylvania Co. v. Franer*, 622.

21. Contributory negligence wholly a question for jury. *Id.*

22. It is not contributory negligence *per se* for passenger to ride on lower step of front platform of crowded street-car without objection by driver or conductor. *Railway Co. v. Gallagher*, 734, and note.

23. Boy of thirteen got upon lower step of front platform of crowded street-car, and rode for long distance as passenger, holding on with one hand. He was finally knocked off by jolting of car, run over and injured. *Held*, that questions of negligence and contributory negligence, taking into consideration age and capacity of lad, were both for jury. *Id.*

24. Absence of guard or fender on front platform of street-car may be considered with other facts in determining company's negligence. Court will not, however, say, as matter of law, that it is negligence on part of company not to furnish such guard. *Id.*

25. General principle is, that where both parties by their negligence directly contribute to accident, neither can recover. But plaintiff who has been negligent or even reckless, may show knowledge, on part of defendant, of his peril and that there was time after such knowledge within which to make effort to save him, and then his own negligence will not prevent recovery. Instance, traveller crossing railroad track without stopping to look and listen. *Maryland Co. v. Neuber*, 349.

26. In absence of statutory requirement there is no legal obligation on railroad company to keep flagmen at crossings of public country road. *Id.*

27. Presumption that party acts from incentives of self preservation can only be indulged in absence of proof to contrary. *Id.*

28. Person approaching railway crossing with team, and having reason to suppose that regular passenger train had recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction, especially when it would be impossible to see or hear approaching train because of obstruction to sight and sound. *Bowen v. Railroad Co.*, 147.

29. Instruction that it was duty of person approaching railway crossing to have looked up track, if by so doing he could have ascertained approach of

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train at sufficient distance to have avoided it, is proper. What was such sufficient distance was for jury. *Bowen v. Railroad Co.*, 147.

30. Question being whether bell was rung and whistle blown as locomotive approached crossing, evidence that those things were not done at similar crossing three miles distant was admissible. *Id.*

31. Where railroad employee was sent on wrecking train to assist in removing debris, and instead of taking his seat in car, in violation of published rule of long standing entered locomotive and took seat with fireman, just in front of latter, where he remained until collision with freight train, and he was killed, held, that there could be no recovery, notwithstanding negligence of servant in charge of train. *Abend v. Railroad Co.*, 277.

32. It is sufficient to prevent recovery if negligence of person injured or killed materially contributes to injury, whether it contributes to force causing injury or not. *Id.*

33. In case of such voluntary exposure as above there can be no recovery, even though negligence of defendant be gross, if its act be not wanton or willful. *Id.*

34. Where there is evidence tending to prove negligence on part of defendant, and also evidence from which proper inference to be drawn as to fault on plaintiff's part is doubtful, it should be submitted to jury to determine whether plaintiff was injured by his own fault or that of defendant. *Kelly v. Howell*, 215.

35. Contractor agreed with owner of mine to do certain work therein, owner engaging to furnish and put up such props or supports for roof of mine as would render miners secure, whenever notified by contractor that same were necessary. Held, that actual knowledge was equivalent to such notice. If overseer of mine acted in behalf of partnership of which he was member, and mine, at time of injury of employee through want of said supports, was in occupation of firm, and the work was being done therein for firm's use and benefit, the partnership will be liable for neglect to furnish and put up supports necessary for safety of contractor's employees. *Id.*

36. Traveller upon street in city, crossing railroad track, has right to presume that trains will not be run at greater rate of speed than is limited by city ordinance. Trial judge did not err in substantially directing jury to take into consideration all objects and things at crossing of street and railroad, and to consider what was done by deceased under all these circumstances, and in saying that if they found that his action was that of person of ordinary prudence, they must also find he was not guilty of contributory negligence. *Hart v. Devereux*, 214.

37. Rights of way of railroad company is exclusive property of such company, upon which no unauthorized person has right to be; the mere acquiescence of company in use of same as footway, does not give right of way over track, or create any obligation for special protection: *B. & O. Railroad Co. v. State*, 348.

38. Where person trespassing upon such right of way was run over and killed; and place where accident occurred, though within corporate limits of Baltimore, was not upon any street or public way, held, that in absence of other negligence, non-compliance with ordinance requiring that when locomotive is used in city limits, a man shall be required to ride on front of same when going forward, and when going backward, on the tender, not more than twelve inches from road bed, did not, *per se*, render company liable. *Id.*

39. Upon street railway separate track was used for cars going in each direction, and frogs were so placed as to prevent cars going in proper direction from being thrown from track while going upon or leaving switch-bridge. Loaded wagon having broken down on bridge upon one of tracks, car approaching thereon was necessarily lifted to other track, and being then driven rapidly upon bridge, was thrown from track, injuring passenger. Held, that company was not negligent in not placing frogs so as to prevent car going in wrong direction from being thrown off track, but that question whether the speed was not negligent was for jury. *White v. Railway Co.*, 527.

40. To justify assessment of damages for future or permanent disability, it must appear that such disability is reasonably certain. *Id.* See *ante*, 11.

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41. Plaintiff's horse was frightened at steam shovel, and ran, throwing plaintiff out of carriage and injuring him. Shovel was located on defendant's land and used to obtain gravel to ballast its road-bed near highway in which plaintiff was travelling. Defendant's evidence tended to show that shovel was operated and wholly controlled by one M., an independent contractor, and his servants, although its use was contemplated when contract was made. *Held*, that work being lawful and shovel not a nuisance, until it became so by negligent use, defendant was not liable unless relation of master and servant existed between it and those operating shovel; unless it not only prescribed end but directed means and methods. *Bailey v. Railroad Co.*, 685.

NEGOTIABLE INSTRUMENT. See **BILLS AND NOTES**. **GUARDIAN AND WARD**, 2. **MUNICIPAL CORPORATION**, 13.

1. Bonds of the United States are negotiable, though "called," until period at which they were originally made payable; *bona fide* purchaser of such bonds, which had been stolen, has good title. *Morgan v. United States*, 350.

2. Where by connivance of clerk in office of assistant treasurer of United States person unlawfully obtains from that office money of the United States, and, to replace it, pays to clerk money which he obtained by fraud from bank, clerk having no knowledge of means by which latter money was obtained, the United States are not liable to refund the money to bank. *State Bank v. United States*, 487.

NOTICE. See **BANK**, 2. **BILLS AND NOTES**, 9. **EVIDENCE**, 22. **GUARDIAN AND WARD**, 2. **HIGHWAYS, ETC.**, 1, 2, 9. **MINES AND MINING**, 2. **MORTGAGE**, 3, 5, 17. **NEGLIGENCE**, 35. **PARTNERSHIP**, 12, 13. **SALE**, 6. **TELEGRAPH**, 6.

1. Mortgage for \$2000 was recorded as one for \$200. *Held*, that record was no notice of \$2000 mortgage. *Hill v. McNichol*, 147.

2. When purchaser of real estate, without notice of prior unrecorded deed, for valuable consideration, conveys to one who had notice thereof, title of latter is not affected. *Id.*

3. To subject purchaser to notice of *lis pendens*, in absence of actual notice, purchase must be made from one who was party to suit at time. *Marchbanks v. Banks*, 421.

4. Purchaser, though without notice of outstanding equities, is not an innocent purchaser unless he has paid the whole consideration. Payment of part and securing residue, are not sufficient. But he has an equity to reclaim out of property, part innocently paid. *Id.*

5. B. sold to C. real estate, placed him in possession, and agreed in writing to execute to him deed on payment of purchase-money in monthly instalments. Subsequently B. executed to A. mortgage on premises, which was recorded. *Held*, that such mortgage was valid, but subordinate to rights of C.; that C. or his assignee may validly make payments of purchase-money to B. until A. or his assignee by suit or otherwise asserts right to unpaid purchase-money. *Ramsey v. Hardy*, 487.

NUISANCE. See **LIMITATIONS**, **STATUTE OF**, 3, 4, 10.

1. He who creates nuisance on his own premises cannot escape liability for its continuance by demising the premises, although demise stipulates that tenant shall keep premises in repair. *Ingversen v. Rankin*, 750.

2. Landlord whose tenant during term has created nuisance on premises will be liable therefor as soon as he has right of entry or power to abate; and that liability cannot be evaded by renewal of lease without his having taken actual possession. *Id.*

3. *Quare*, Whether knowledge of existence of nuisance is necessary to establish landlord's liability. *Id.*

OFFICER. See **CHARITY**, 1. **CORPORATION**, 18, 19. **MALICIOUS PROSECUTION**, 6. **MANDAMUS**, 1.

1. School agent's election and performance of duties, raise no implied promise on part of town to pay him for such services. *Talbot v. East Mathias*, 147.

2. In absence of implied contract or statutory provision entitling him to pay

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for official duties rendered, school agent can maintain no action therefor against his town. *Talbot v. East Mathias*, 147.

3. Person whose baggage has been lost through negligence of public porter licensed by city, may maintain action on bond given by him to city pursuant to charter and ordinance, for faithful performance of requirements of ordinance and safe delivery of articles entrusted to his care. *City v. Raynard*, 215.

ORDINANCE. See **NEGLIGENCE**, 38. **SUNDAY**, 5.

OYER. See **PLEADING**, 2, 3.

PARENT AND CHILD.

1. Parent who wilfully and negligently permits his son eleven years old to possess a loaded pistol, whereby boy injures infant child of another, is not liable in damages therefor. *Hagerty v. Powers*, 397, and note.

2. Widow marrying acquires domicile of second husband, but does not, by taking children of first husband to live with her there, make that their domicile; they retain the domicile they had, before her second marriage, acquired from her or from their father. *Lamar v. Micou*, 148.

3. Parents of infant child lived apart, and mother supported it both before and after lands were devised to it. Upon death of child parents became its sole heirs. Held, that in equity mother was entitled to allowance out of child's estate for amount expended by her upon its support. *Pierce v. Pierce*, 750.

4. Son, 28 years old, while living with father as hired man on his farm, took father's horse and drove to depot to get one of his own friends. Father did not know that son took horse until after he was gone; but expected and was willing he should do so. Son had driven team before without permission. Horse, tied to post in rear of depot, where father and son were accustomed to hitch, broke away, ran into plaintiff's team and injured him. Referee found that son in tying horse "did not exercise prudence of an average prudent man." Held, that father was not liable, but that son was; that license to use horse could not be inferred from fact of former use without leave. *Way v. Powers*, 621.

PARTICULAR WORDS AND PHRASES.

1. "Common Law." *Walter v. Kirstead*, 141.

2. "Exempted by law." *Petition of Keach*, 421.

3. "Legal Representatives." *Johnson v. Van Epps*, 144.

4. "May." *James v. Dexter*, 624.

5. "Now sailed or about to sail * * with cargo." *The Wickham*, 209.

6. "Reasonable doubt." *State v. Rounds*, 142.

PARTITION. See **TENANTS IN COMMON**, 1.

1. Not obtainable for land adversely held. *Moore v. Gordon*, 623.

2. Where case is fairly within law authorizing partition, the right to it is imperative, and absolutely binding upon courts of equity. *Hill v. Reno*, 548.

3. In event that partition could be effected only through sale of premises and distribution of proceeds, that difficulties may arise in adjustment of distribution, or inconveniences, or even possible losses result from change in relations of parties to estate, by reason of sale, will not affect absolute right to partition. *Id.*

PARTNERSHIP. See **AGENT**, 5. **DAMAGES**, 6. **EXECUTORS AND ADMINISTRATORS**, 4. **HUSBAND AND WIFE**, 29, and p. 366. **LIFE TENANT**. **MINES AND MINING**, 1. **NEGLIGENCE**, 35.

1. Partner cannot bind his copartner by warrant of attorney under his hand and seal in name of firm without previous authority or subsequent ratification. *Ellis v. Ellis*, 750.

2. Surviving partner in good faith but unsuccessfully resisting collection of claim against partnership estate, will be entitled to contribution for reasonable expenses of litigation. *Lee v. Dolan*, 421.

3. One partner may purchase partnership property, and if purchase is not made with intent to hinder, delay or defraud creditors, and property is such as is exempt, may hold it as against firm creditors. *Burton v. Baum*, 79.

4. Not dissolved by death of partner when partnership contract shows con-

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trary intention; as when it takes form of joint stock association, with transferrable shares, officers, records and general agent to transact business. *McNeish v. Oat Co.*, 686.

5. Whether intention was that partnership should not be dissolved by death of partner is for jury to determine, on reasonable construction of articles of agreement interpreted by kind of business contemplated and manner of transacting it. *Id.*

6. Dealing in hullless oats was main business of partnership, under control of general agent, with provision that its "affairs" were to be kept secret. *Held*, that partners might be liable for common oats purchased by agent, although it was not proved they knew of transaction; and that it was their duty to see that their agents transacted no business outside of scope of partnership. *Id.*

7. What agent said to vendor at time of sale as to who partners were and what was their responsibility, was admissible evidence. *Id.*

8. Test of, as between parties themselves, is their intention; as to creditors, old test of participation in profits has been abandoned; question now is whether business has been carried on in behalf of person sought to be charged as partner. *Culley v. Edwards*, 623.

9. Where note and mortgage have been entrusted to firm of attorneys for collection, mere dissolution of firm will not release one partner from responsibility to client for money subsequently collected by other partner to whom that business was, by terms of dissolution, transferred. *Waldeck v. Brand*, 148.

10. Partners may make any agreement they see proper for management of their joint affairs; but provisions of such agreements are liable, at least in court of equity, to be controlled or qualified, or to be held altogether waived, when assent of all partners may be fairly inferred. *Hall v. Sannouer*, 421.

11. One partner is not liable to another for honest mistake of judgment. *Id.*

12. In action against members of partnership upon promissory note, and account annexed for goods sold and delivered, if one of issues is whether plaintiff had notice of dissolution of partnership, notice thereof published in newspaper is competent, in connection with other evidence tending to show that plaintiff saw and read notice. *Smith v. Jackman*, 548.

13. In such case plaintiff testified that he had no knowledge of such dissolution until after bringing of action. Partner who alone defended action, was allowed to put in evidence certain bills or statements of account for goods sold and delivered to him personally by plaintiff at various times after cause of action accrued. *Held*, no ground of exception by plaintiff. *Id.*

14. Where member of partnership retires, and his copartners thereupon agree, in good faith, to pay him sum certain as his share of capital, and firm afterwards unexpectedly turns out to have been insolvent at time of said withdrawal; *Held*, that bank from which new firm had borrowed money which they had partly used in making payments to said retiring member, could not in equity charge old firm with money loaned to new, nor retiring partner with moneys obtained from it and used to pay him, retiring partner having paid in discharge of debts of old firm, more than amount received by him as his share of capital thereof. *Penn Bank v. Furness*, 488.

PATENT. See EQUITY, 12. TELEPHONE, 3.

1. Receiver of insolvent debtor is entitled to patent right belonging to debtor, and court may order debtor to assign it. *Petition of Keach*, 421.

2. Words "exempted from attachment by law," mean, by statute. *Id.*

3. Novelty and increased utility do not necessarily constitute invention. *Hollister v. Benedict Co.*, 278.

4. Where one of two patents for infringement of which suits were brought, expired before United States Supreme Court reversed decrees of Circuit Court dismissing bills, it awarded accounts of profits and damages as to both patents, and a perpetual injunction as to second. *Valve Co. v. Valve Co.*, 278.

5. In order to obtain a re-issue for mere purpose of enlarging claim, there must be both a clear mistake, inadvertently committed, in wording of claim and application for re-issue within reasonably short time. *Coon v. Wilson*, 350. See *infra*, 7, and 9-11.

6. Use of old device for new purpose, if patentable at all, is only so when

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the result is new and different in character from the original; and then the patent will be for an improvement on the original invention. *Blake v. City*, 350.

7. Reasonableness of delay in applying for re-issue is for court, and decision of patent office in granting re-issue that delay in application therefor had been satisfactorily explained, will not avail complainant. Unexplained delay of five years too long. *Wallsak v. Reikner*, 549. See *ante*, 5; *infra*, 9-11.

8. In patents for combinations of mechanism, limitations and provisos imposed by inventor, especially such as were introduced into application after it had been persistently rejected, must be looked upon as in nature of disclaimers. *Sargent v. Hall Co.*, 421.

9. In case of re-issue whether there has been clear mistake in wording of original claim, is, in general, matter of fact for commissioner; but whether application is made in reasonable time is matter of law, which court may determine by comparing re-issue with original, and if necessary, with records in patent office, when presented by the record. *Maher v. Harwood*, 148. See *ante*, 5, 7.

10. No invariable rule can be laid down as to what is a reasonable time. Court will exercise proper liberality towards patentee. By analogy to rule as to effect of public use before application for patent, delay of more than two years would in general require special excuse. *Id.*

11. As, in present case, there was delay of nearly four years, and original patent was free from obscurity, *held*, that delay was unreasonable. *Id.*

PAYMENT. See EVIDENCE, 14, 15, 20. LIMITATIONS, STATUTE OF, 12. MORTGAGE, 15. USURY, 4, 5.

1. Right of creditor to make application of payments to one of several debts applies only to debts then due, and only when debtor himself makes no appropriation. *Gates v. Burkett*, 421.

2. Check of one bank upon another to order of buyer was by him endorsed and sent to seller to pay for bill of goods, and seller sent receipt for bill, both supposing check to be good, while in fact there were no funds to meet it at time it was drawn or afterward. *Held*, that in action on account for goods sold and delivered, plea of payment cannot be maintained. *Fleig v. Sleet*, 350.

PEDIGREE. See EVIDENCE, 20.

PENALTY. See SUNDAY, 1.

PENSION.

1. Not exempt from execution after it has come to pensioner's hands, notwithstanding U. S. Rev. Stat., sect. 4747. *Friend v. Garcelon*, 804, and *Crane v. Linneus*, 804.

2. One who loans money to pension claimant to enable him to establish his claim, and to be repaid when pension money is received, is not debarred from recovering his loan by U. S. Rev. Stat., sect. 5485. *Crane v. Linneus*, 804.

3. Verbal promise by pension claimant to pay debt when he receives pension, is not such pledge, mortgage, assignment, transfer, or sale of pension claim, as is forbidden by U. S. Rev. Stat., sect. 4745. *Id.*

PHYSICIAN. See CRIMINAL LAW, 25. EVIDENCE, 7-10.

PLEADING. See AMENDMENT, FRAUDS, STATUTE OF, 5. INSURANCE, 8-10, 15. SLANDER AND LIBEL, 2.

1. Replication of fraud to plea of release must set out fraudulent acts relied on. *Friedburg v. Knight*, 422.

2. Where pleading does not show that instrument of which profert is made is under seal, oyer is not demandable. *Merly v. Ins. Co.*, 339.

3. Even though oyer be not demandable, if it appears that knowledge of paper is proper or necessary for either party, it is practice of court to make order for its production. *Id.*

4. Where state statute regulates practice in making such application, that practice will be followed in the federal courts. *Id.*

PLEADING.

5. In action for personal tort, amount of damages claimed must be laid in declaration; if not, defect will be fatal on general demurrer. *Treusch v. Kamke*, 750.

6. Amount of damages claimed in such case is jurisdictional fact; if over \$100, Common Pleas has jurisdiction; if less, justice of peace has exclusive jurisdiction. *Id.*

PLEDGE. See **BANK**, 1. **INSURANCE**, 19. **LIMITATIONS**, **STATUTE OF**, 9. **SALE**, 2, 4-6.

POSSESSION. See **MORTGAGE**, 2, 12. **MUNICIPAL CORPORATION**, 10, 11. **NOTICE**, 5. **SALE**, 7, 8. **TROVER**, 1.

1. Possession of life tenant is not adverse to estate of remainderman, and he cannot make it so. Acceptance of deed from true owner granting life estate to acceptor, with remainder over, waives any right latter may have acquired by former adverse possession. *Keith v. Keith*, 215.

2. If A. is entitled to conveyance of land and, by agreement between A. and B., in order to defraud A.'s creditors, land is conveyed to B., title thereto by adverse possession of more than twenty years may be acquired by A. against B., although A. is without means to pay his debts during such possession, if B. knows that A. is holding land adversely. *Elwell v. Hinckley*, 549.

3. At trial of writ of entry, if demandant relies upon title acquired by grantor by adverse possession, books of assessors of taxes of town in which land lies are evidence of assessment of land to demandant's grantor during period of alleged adverse possession. *Id.*

POWER. See **TRUST AND TRUSTEE**, 3.

When a power, coupled with the trust, is given to two or more persons to be executed by them jointly, and one renounces, other or others may execute power as if originally given only to them. In this case one of the trustees refused to act and survivor did not make appointment in his stead, as testator desired him to do. *Held*, that sales and deeds made and given by the survivor were valid. *Petition of Bailey*, 686.

PRACTICE. See **EQUITY**, 1, 6, 10-12, 15, 16. **ESCAPE**, 2. **EVIDENCE**, 1. **PATENT**, 4. **PLEADING**, 2-4. **SPECIFIC PERFORMANCE**, 1, 2. **TRUST AND TRUSTEE**, 1.

1. Exception to modification, in charge, of proposition submitted, must be specific. *Ins. Co. v. Trust Co.*, 55.

2. In action at law, submitted to decision of circuit court, waiving trial by jury, in which record does not show filing of stipulation in writing required by sect. 649 of Rev. Stat., Supreme Court of United States, upon bill of exceptions and writ of error, cannot review rulings upon any question of law growing out of the evidence, but may determine whether declaration is sufficient to support judgment. *Bond v. Dustin*, 216.

3. The filing of said stipulation is not sufficiently shown by statement in record or in bill of exceptions, that "the issue joined by consent is tried by the court, a jury being waived," or that "the case came on for trial by agreement of parties, by the court, without the intervention of a jury." *Id.*

PRE-EMPTION. See **UNITED STATES**, 3.

PRESCRIPTION. See **LIMITATIONS**, **STATUTE OF**, 3. **WAY**, 1, 2.

PRESUMPTION. See **EQUITY**, 12. **EVIDENCE**, 19. **HUSBAND AND WIFE**, 8. **MASTER AND SERVANT**, 11. **MORTGAGE**, 15. **NEGLIGENCE**, 27, 36.

PUBLIC POLICY. See **AGENT**, 4. **COMMON CARRIER**, 22. **INSURANCE**, 5. **SUNDAY**, 2-4. **WILL**, 6.

RAILROAD. See **ACTION**, 2, 3, 16, 17. **AGENT**, 5-9. **ASSIGNMENT**, 1. **COMMON CARRIER**, **CORPORATION**, 20, 23. **DAMAGES**, 8. **MANDAMUS**, 3. **MASTER AND SERVANT**, 3-5, 8-12. **MECHANICS' LIEN**, 1. **NEGLIGENCE**, 4, 14-16, 18-20, 22-26, 28-31, 36-39. **TAX AND TAXATION**, 1. **WAY**, 4, 5.

1. Charter to run road from boundary between South Carolina and Georgia to city of Augusta, and, with assent of railroads in Georgia, to join its track to

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theirs, did not confer power to run road through Augusta so as to connect with another railroad. *City Council v. Railway*, 350.

2. In action brought against railroad company in behalf of next of kin, to recover damages for injuries resulting in death of person, nominal damages may be recovered, if it appears that death was caused by wrongful act or omission of defendant, although no actual pecuniary damages may have been suffered. *Atchison Rd. v. Weber*, 479.

3. Where conduct of passenger is such as to render his presence dangerous to fellow-passengers or to occasion them serious annoyance and discomfort, he should be excluded from train. *Id.*

4. Where unattended passenger becomes sick and unconscious or insane, it is duty of railroad company to remove him from train and leave him until he is in fit condition to resume journey, or shall obtain necessary assistance. *Id.*

5. Duty of company is not only to remove such passenger from train, but also to exercise reasonable and ordinary care in temporarily providing for his protection and comfort. It is sufficient in case of such passenger without friends or money, to properly remove him from train and promptly place him in charge of overseer of poor. The statute making it duty of such overseer to grant temporary relief to any non-resident found lying sick in the township or city, or in distress and without friends or money, at expense of county. *Id.*

6. Where trustees for bondholders are operating road, under mortgage for security of bondholders, they are liable, to extent of funds received, to keep road, &c., in repair, furnish new rolling stock when necessary, pay running expenses and apply balance to payment of damages from misfeasance in management of road, and after that to mortgage, as rights of parties may require. Claim for damages to property by fire communicated by locomotive during such period, does not depend upon proof of misfeasance, but is an incident to running of road, and may be considered part of running expenses, and is therefore an equitable lien upon the funds liable in trustees' hands. *Stratton v. Railway Co.*, 79.

7. When trustees have conveyed to new corporation, formed by bondholders, such funds subject to such lien, to that extent new corporation would be liable in equity. *Id.*

8. In such case bill should aver that at time of alleged injury and demand for payment, trustees had such funds, or subsequently conveyed such funds to new corporation. *Id.*

RATIFICATION. See **AGENT**, 8, 9.

RECEIVER. See **CORPORATION**, 7, 14, 17, 27, 30. **LIS PENDENS.** **PATENT**, 1.

1. Fund collected by receiver appointed in action brought by junior mortgagee of land, is applicable to the liens in order of priority. *Williamson v. Gerlach*, 623.

2. May be appointed to take charge of assets of insolvent corporation, to save same from waste, before court acquires jurisdiction to adjudicate upon rights of such corporation. Placing property in hands of receiver is in nature of equitable attachment, whereby court, through its officer, acquires custody of such property. *Coal Co. v. Coal Co.*, 278.

3. In absence of statutory provision on subject, real estate cannot be vested in receiver, except by conveyance to him. *Id.*

REFORMATION. See **EQUITY**, 2, 3.

RELEASE. See **ATTORNEY**, 5. **GUARANTY**, 2.

RELIGIOUS SOCIETY. See **CHARITY**, 2. **CORPORATION**, 24-25.

REMOVAL OF CAUSES.

1. Separate answers to one cause of action, raising separate issues, do not make separate controversies within second clause of section 2 of Act of March 3d, 1875. *Ayres v. Wiswall*, 79. See *infra*, 5.

2. In contest over ownership of stock in which it is sought to have the corporation cancel certain shares standing in name of another and issue certificates therefor to plaintiff, the corporation is a necessary party. *Crump v. Thurber*, 549.

REMOVAL OF CAUSES.

3. Such corporations as Union Pacific Railway Co., and Texas and Pacific Railway Co., created by and organized under Acts of Congress, are entitled, under Act of March 3d, 1875, to remove suits against them, on ground that they are suits "arising under the laws of the United States." *Pacific Railroad Rem. Cases*, 550.

4. Where assignment of cause of action is legal and valid, fact that it was made for express purpose of depriving defendant of right to remove case to Federal court, will not invalidate it or entitle defendant to removal. *Vinmont v. Railway Co.*, 724.

5. In action for damages for malicious prosecution of previous action, where defendants separate in their answers, one party of them cannot claim that there is a controversy wholly between themselves and plaintiffs, such as is contemplated by second clause of sect. 2, of Act of March 3d, 1875. *Pirie v. Toedt*, 550. See *ante*, 1.

6. Where bond of administrator is by law taken to state, but is held for security of persons interested in estate of the deceased, suit thereon, so far as jurisdiction of United States Circuit Court is concerned, must be treated as though person for whose use suit is brought was alone named as plaintiff. *Maryland v. Baldwin*, 216.

7. Sect. 3, of Act of March 3d, 1875, prescribing time when petition for removal may be filed, &c., is not jurisdictional but formal; application in due time and proffer of proper bond, as required by it, may be waived, either expressly or by implication; and party at whose instance removal has been effected, is estopped from objecting that application therefor was too late. *Ayers v. Watson*, 351.

8. Proceeding in state court against administrator, to obtain payment of debt due by decedent in his lifetime, is removable into United States Court when creditor and administrator are citizens of different states, notwithstanding state statute may enact that such claims can only be established in certain state courts. *Hess v. Reynolds*, 279.

9. Third clause of sect. 639, of Rev. Stat. (authorizing removals on ground of prejudice or local influence), is not repealed by Act of March 3d, 1875. *Id.*

10. Application for removal, under said third clause, is in time if made before trial or final hearing of cause in state court. *Id.*

REPLEVIN. See GUARDIAN AND WARD, 2.

Cannot be maintained for mass of cotton in which plaintiff's has been innocently mixed by defendant, nor for undivided share. It must be first separated and capable of identification. *Hurt v. Morton*, 623.

RESIDENCE. See ATTACHMENT, 1.

SALE. See CONTRACT, 5.

1. Delivery of goods on sale for cash is not necessarily a conditional one, for vendor may waive the conditions. Whether there has been such waiver is question of fact. *Fishback v. Van Dusen*, 506, and *note*.

2. To constitute executed contract of sale, pledge or mortgage of goods, some specific property must be appropriated to the contract. *Id.*

3. *Semble*, where party delivers or deposits grain with another, with agreement, expressed or implied, that latter may use and dispose of it, and return equal amount of other grain of same quality, transaction constitutes a sale and not a bailment. *Id.*

4. Pledge by warehouseman without segregation from uniform mass. *Id.*

5. Registered bill of sale of personal property which includes stock in trade to be afterwards acquired, is as to such stock, only a contract to assign; vendee cannot maintain trover for the property against *bona fide* pledgee, who received such goods from vendor in ordinary course of business. *Joseph v. Lyons*, 298, and *note*.

6. In absence of anything to lead pledgee to believe bill of sale existed, he is not chargeable with constructive notice by reason of failure to inquire. *Id.*

7. Of saw-logs piled on land so low and wet that it was impossible to remove them, except on frozen ground, without cost exceeding value of logs, is valid as against attaching creditors, without change of possession. *Kingsley v. White*, 750.

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8. But if change of possession had been necessary, *held*, that facts that vendor had sold and conveyed lot to third party by deed with only one witness, that such third party, vendor and purchaser, with his attorney, went on lot, and marked logs with purchaser's initials, third party agreeing to take care of them for him, did not constitute sufficient change of possession, as it was not found—and court could not infer it—that third party was in open visible possession of lot. *Kingsley v. White*, 750.

9. Where proposition to sell goods is sent by writing, that, by mistake, is ambiguous, and knowing of such ambiguity, receiver of writing, claiming an improbable meaning unreasonably favorable to himself, and not intended or thought of by sender, and without notice to sender or inquiry of him as to his intended meaning, orders the goods, obtains and uses them, he is liable to seller for their value as if no proposition had been sent. *Butler v. Moses*, 488.

SCHOOL. See CONSTITUTIONAL LAW, 13. OFFICER, 1, 2.

1. Injunction will not be granted to restrain reading of bible, or singing of religious songs, in school, at suit of tax-payer whose children are not required to be present during such exercises. *Moore v. Monroe*, 252, and note.

2. Sect. 1764 of Iowa Code, providing that the bible shall not be excluded from any school or institution, nor shall any pupil be required to read it, contrary to parent's or guardian's wishes, is not in violation of article in Bill of Rights, providing: "Nor shall any person be compelled to attend any place of worship, pay * * * taxes * * * for building or repairing places of worship," &c. *Id.*

3. Power of school boards, generally. *Id.*

4. Teacher in public schools, in absence of rule of school board, has right to adopt rule to prevent his pupils using profane language, fighting or quarrelling on their way to and from school, and may punish those infringing the rule, by use of rod. *Deskins v. Goss*, 663, and note.

5. Regulation that each scholar, when returning after recess, shall bring into school-room, stick of wood for fire, is not "needful" for government, &c., of schools; and scholar cannot be suspended for refusal to comply with such regulation. *State v. Board of Education*, 601, and note.

SEAL. See AGENT, 2. BILLS AND NOTES, 3. CORPORATION, 29.**SET-OFF.** See HUSBAND AND WIFE, 21.

1. Decree in admiralty on libel for damages may be set off against judgment recovered in state court, parties in two suits being the same. *Schantz v. Kearney*, 751.

2. Where suit was brought on physician's account for services and medicine, it might be pleaded that he did not do his work skilfully, or plea of recoupment might be filed, springing out of contract; but plea of set-off, based on tort in giving defendant too large a dose of medicine, which injured him to amount of \$200, was improper, even if defendant was insolvent. *McLeroy v. Sewell*, 149.

3. Maker of separate note in suit may, in equity, set off joint note of plaintiff and another who are both insolvent. Holder of note who took it after maturity holds it subject to every objection, including equitable set-off, to which it was subject in hands of his assignor. Merger of debt into judgment is not so perfect in equity as to preclude judgment creditor from resorting to original demand and relations of parties to it, to enable him to disclose and assert equitable set-off. *Baker v. Kinsey*, 216.

SHIPPING. See MASTER AND SERVANT, 1.

If hull and spars of vessel are completed at one port, and sufficient rigging is put on her, and sufficient cargo for ballast is taken, to enable her to go to another port, where materials necessary to rigging and equipment of vessel, and first put upon her, are procured, materials so furnished at latter port are furnished in "construction" of vessel. *McDonald v. The Nimbus*, 279.

SLANDER AND LIBEL.

1. Candidate for public office, conferred by popular election, puts his character in issue, so far as respects his qualifications for office; and whatever per-

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tains thereto is legitimate subject for discussion and comment, which must, however, be confined to truth, or what, in good faith and upon probable cause, is believed to be true. *Express Co. v. Copeland*, 640, and note.

2. In suits for libel, when defendant has asserted several inconsistent pleas in his answer, *inter alia*, one justifying by asserting truth of alleged libellous matter, failure to establish such plea is not to be taken as tending to establish malice, and to aggravate injury done defendant. *Id.*

3. In action of slander petition charged defendant with having spoken certain false, malicious, and defamatory words concerning plaintiff, while giving his testimony before court having jurisdiction of subject-matter then on trial, in answer to interrogatories put to him. Upon demurrer, *held*, 1st. That court will presume, in absence of averment to contrary, that answers of witness were within scope of inquiry pertinent to issue on trial, and that they were believed by witness to be true. 2d. That upon statements of petition and presumptions arising therefrom, witness was absolutely privileged. *Liles v. Gaston*, 351.

4. Certain citizens presented to their town council request that K. might be removed from office of constable because, "firstly, said K. is a man utterly devoid of principle, and uses his office more for the purpose of wreaking his personal spite than for the peace and harmony of the community; secondly, said K. is wholly ignorant of the duties of his office; thirdly, said K. has at various times heretofore maliciously and wickedly assaulted and arrested sundry persons who were entirely innocent of the charges against them." *Held*, that statements were not such as, if proved untrue, to imply actual malice. *Kent v. Borgartz*, 683.

SPECIFIC PERFORMANCE. See EQUITY, 7, 8.

1. When, on decree for, defendant is in contempt for refusal to perform, court may establish contract as if it had been executed, and enjoin and restrain defendant from denying its execution and delivery. *Wharton v. Stoutenburgh*, 351.

2. Such decree may be without notice, but defendant has right of appeal. *Id.*

3. Decreed against vendor's sole devisee in case of parol contract for sale of land, when vendee, with assent of vendor, took open, actual possession of premises in pursuance of agreement, made permanent erections thereon, promptly paid taxes assessed thereon to him by direction of vendor and substantially performed his agreement. *Woodbury v. Gardiner*, 804.

STATUTE. See CONSTITUTIONAL LAW, 9, 10, 29, 32. EVIDENCE, 22.

1. May be repealed by implication by subsequent act covering whole ground. *Bracker v. Smith*, 422.

2. In construing statute, punctuation may aid, but does not control, unless other means fail, and may be changed or disregarded. *Albright v. Payne*, 351.

3. It is duty of courts to take judicial cognisance of public local laws, within sphere of their operation, equally with public general laws. *Slyner v. Maryland*, 351.

4. "May" means "shall" wherever rights of public or third persons depend upon exercise of power, or performance of duty to which it refers. *James v. Dexter*, 624.

STOCK. See CORPORATION, 1, 2, 11, 14-17, 29. TAX AND TAXATION, 2, 3.**STREET.** See ACTION, 16, 17. CONSTITUTIONAL LAW, 19-21. HIGHWAYS, ETC. MUNICIPAL CORPORATION, 4. NEGLIGENCE, 9, 10.**SUBROGATION.** See BANK, 3. MORTGAGE, 19.

1. Where land owner, to save his land, pays note secured by deed of trust executed by former owner, upon which he is not legally liable, he is subrogated to rights of holder as against maker. *Allen v. Dermott*, 216.

2. Rule that where one of two joint sureties holds collateral other is entitled to share in it, does not apply where sureties are on separate bonds to secure faithful discharge of principal's duty in different capacities, first as guardian of insane ward, and then on ward's death, as administrator of her estate, when collateral was not given as security for signing bond, but for signing as surety certain bank-notes; although after it was claimed that principal was

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in default, sureties entered into written agreement to join in defence and share equally in liability; and defendant realized more out of collaterals than he was compelled to pay on said notes. *Sowers v. Johnson*, 751.

SUNDAY. See **COMMON CARRIER**, 24, 25. **HIGHWAYS, ETC.**, 5.

1. Contracts made on Sunday are not void on moral grounds, but because of the penalty inflicted by statute. *Seann v. Swann*, 378, and note.

2. When by laws of state, large class of citizens may lawfully labor, etc., on Sunday, it is not, in legal sense, against public policy of such state, nor shocking to moral sense of its people, for its courts to enforce contract made on that day in another state, and valid by law of that state. *Id.*

3. Such contract will be enforced by courts of state, by laws of which it would be void. *Id.*

4. The only admissible evidence of public policy of state are its constitution, laws and judicial decisions. *Id.*

5. Publication of ordinances with respect to street improvement, in newspaper of general circulation, in accordance with statute, is valid, although such newspaper is only published on Sunday. *Hastings v. City*, 352.

6. Contract of sale made on Sunday is void; but parties may, on subsequent week day, affirm or adopt its terms, as by payment and receipt of purchase-money, and so become bound by them. Demand of payment on week day would compel purchaser to adopt contract or insist on its invalidity. *McKinney v. Denby*, 422.

SURETY. See **GUARANTY**, 1. **INTEREST**, 1. **MORTGAGE**, 6. **SUBROGATION**, 2. **USURY**, 3.

1. Extension for definite time given on principal note, to which the note on which sureties are liable is collateral, without their consent, discharges them. *Slagle v. Fox*, 624.

2. Of receiver in chancery concluded in suit at law on bond, by amount found due on account taken in chancery, he having by due notice had opportunity to intervene in taking of such account. *Ball v. Chancellor*, 687.

3. On official bond of city clerk, who by city charter is also *ex officio* register of licenses of city, liable for embezzlement by him of license fees. *Van Valkenburgh v. Mayor*, 687.

4. Orators were sureties on note, and defendant payee. Principal attempted to induce payee to accept his own note secured by mortgage on lot of land owned by him in lieu of said note; and payee took mortgage into his possession, and agreed to exchange, if on examination he should find title clear of encumbrance. On being informed by town clerk that there was undischarged mortgage on land, he refused to exchange, and returned mortgage to principal, although surety requested him to hold it. It turned out afterwards that land was clear. *Held*, that surety was not released. *Adams v. Dutton*, 751.

5. Wise needed money. Willard agreed to endorse his note to S. for \$2700, at four months, if Wise and wife would make to him their note for \$3000, at four months, secured by mortgage on wife's land; he to hold and use said mortgage to protect himself against loss and expense because of said endorsement. Neither note was paid at maturity. Mortgage note was never extended, but other note was renewed by agreement of parties to it for valuable consideration. It remained unpaid, and Willard sued Wise and wife on mortgage note. She set up extension of \$2700 note as release of her property. *Held*, as Willard made no extension of mortgage note, he did not lose his right to enforce mortgage. *Wise v. Willard*, 624.

TAX AND TAXATION. See **CONSTITUTIONAL LAW**, 1, 14, 15, 22, 23, 27, 28, 30, 33. **CORPORATION**, 20. **EJECTMENT**, 1. **INJUNCTION**, 3. **MUNICIPAL CORPORATION**, 1, 2, 15. **NATIONAL BANK**. **POSSESSION**, 3.

1. Exemption from, granted to railroad, is personal privilege, incapable of transfer, and does not pass to purchaser of road under mortgage. Lost in this case by consolidation. *Railroad Co. v. Berry*, 422.

2. Under Vermont statute stock of non-resident stockholders of corporation located in that state may be legally set in list of town in which corporation has

TAX AND TAXATION.

its principal place of business; and corporation compelled by mandamus to pay taxes assessed upon such stock. *St. Albans v. Nat. Car Co.*, 624.

3. Statute authorizing such taxation, and allowing corporation to deduct taxes thus paid from dividends, is constitutional. *Id.*

4. When charter is taken subject to future legislation, it may be modified not only by special amendments, but also by general law. *Id.*

5. Only those individuals who can use city sewers should be specially taxed for their construction or maintenance, and each in proportion to the benefits he might individually receive. *Gilmore v. Hertig*, 279.

6. In such cases, before special taxes can be made a fixed and permanent charge upon property of such individuals, they must have notice, with opportunity to contest validity and fairness of such taxes; but notice need not be personally served or given before taxes are levied, nor need the proceeding be judicial. *Id.*

TELEGRAPH. See CONTRACT, 2, 3.

1. Company liable for loss naturally following failure to transmit message promptly and correctly, although it was in cipher or otherwise unintelligible. *Hart v. Telegraph Co.*, 320, and note. But see same case, 604.

2. Stipulation in telegraph blank that company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery of any unrepeat message, whether happening by negligence of its servants or otherwise, beyond amount received for sending same, is void for want of consideration. *Id.* Reversed, 604. See also *Clement v. Telegraph Co.*, 328, and note.

3. Company cannot stipulate against liability for its own negligence; it is exempt only for errors arising from causes beyond its control, and burden of showing such exemption rests upon it. *Hart v. Telegraph Co.*, 320, and note. Reversed, 604.

4. Although telegraph blank is not used, if sender is aware of company's conditions, he is bound thereby. *Clement v. Telegraph Co.*, 328, and note.

5. In suit for damages for not delivering cable message within reasonable time, copy message written by operator at point of destination and eventually delivered, was admissible, without producing original, there being no claim that message delivered differed from what was sent. *Tel. Co. v. Fatman*, 149.

6. Where ship broker, whose office was near that of telegraph company, had sent other messages by cable through such company, and cipher message from Liverpool was sent to him, there was enough to put company on notice that it was a matter of important commercial business, and required reasonable and ordinary despatch in delivery; and party injured by failure to use such despatch would not be limited to nominal damages. *Id.*

7. Telegraph companies and common carriers are not identical as regards notice, or notice of value of despatch. *Id.*

8. If company receives cipher despatch, and undertakes to deliver it for money paid, it is their duty to make such delivery within reasonable time; where message by cable was received at 10.24 and not delivered until 11.55 to office, within five minutes walk, jury were warranted in finding unreasonable delay. *Id.*

9. Where by reason of failure to deliver message, ship broker, to whom message was directed, lost contract, recovery of his commissions was proper. *Id.*

TELEPHONE. See EVIDENCE, 18.

1. Is a common carrier and must furnish equal facilities to all; may be compelled so to do by mandamus. *State v. Telephone Co.*, 262.

2. Having removed telephone because of a disputed bill which subscriber refused to pay, company cannot afterwards, on that account, refuse to admit alleged delinquent as subscriber. *Id.*

3. A., Massachusetts corporation, and owner of patent on telephone, licensed B., Missouri corporation, to do telephone business of St. Louis, upon condition that B. should not connect with any telegraph company unless specially authorized by A. A. permitted B. to establish connection with Western Union Telegraph Co. Thereafter B. & O. Tel. Co. applied for mandamus to compel B.

TELEPHONE.

to permit telephonic communication between it and petitioner. *A.* was not made a party. *Held*, that petitioner was entitled to relief asked. *B. & O. Co. v. Bell Co.*, 573, and note.

TENANTS IN COMMON. See **FRAUDS, STATUTE OF**, 3, 4.

1. One tenant in common is not entitled to recover from his co-tenant contribution in respect of repairs, although reasonable and necessary, done to the common property. Proper remedy is by partition suit, in which court will take into account all proper expenditure upon the property. *Leigh v. Dickeson*, 499, and note.

2. Defendant was assignee of lease granted by plaintiff of undivided three-fourths of certain premises to which plaintiff was entitled as tenant in common with another. During lease the defendant purchased the one-fourth interest of plaintiff's co-tenant. On expiration of lease defendant continued in occupation of above three-fourths as tenant at sufferance to plaintiff. *Held*, that plaintiff was entitled to recover in respect of use and occupation by defendant of undivided three-fourths. *Id.*

TORT. See **ACTION**, 16. **ASSIGNMENT**, 1. **CONFLICT OF LAWS**, 1. **CONSTITUTIONAL LAW**, 32. **CORPORATION**, 3, 21, 27. **FORMER RECOVERY**, 3. **HUSBAND AND WIFE**, 28. **PLEADING**, 5, 6. **SET-OFF**, 2.

1. Any one owning or keeping an animal that he knows to be of ferocious disposition, accustomed to attack or bite mankind, is bound to restrain such animal at his peril. *Twigg v. Ryland*, 191, and note.

2. Allowing dog to be kept on his premises does not render owner liable for injuries inflicted by dog away from premises, if such owner did not own or have control of dog. *Id.*

3. To charge defendant he must be shown to have knowledge that the animal is inclined to do the particular kind of mischief that has been done. Onus is on plaintiff to prove knowledge of vicious propensities if animal be of domestic nature, but otherwise if it is of a wild nature. *Id.*

4. Knowledge of servant or wife is not knowledge of owner or keeper, unless it be a servant who has general charge of the animal. *Id.*

5. J., who was injured by negligence of defendant railroad company, assigned his claim for damages to V., who executed agreement in which, in consideration of the assignment, he agreed to dispose of amount realized on claim as follows: To retain for himself \$50 and his advances; next, to pay the fees of attorneys and agents employed to prosecute said claim, and to pay the balance to J. *Held*, that the cause of action was assignable; that assignment and agreement did not constitute barratry, champerty or maintenance; and that V. was entitled to maintain the action in his own name. *Vimont v. Railway Co.*, 724, and note. See also *Gates v. Railroad*, 743.

6. In such action, even if it should appear that assignment was colorable and fraudulent, assignor need not be made party to action. *Id.*

TRADE. See **CONTRACT**, 7.**TREATY.** See **INTERNATIONAL LAW**.**TRESPASS.** See **ACTION**, 1. **DAMAGES**, 8. **EQUITY**, 17. **FIXTURES**, 2. **NEGLECT**, 38. **TROVER**, 5, 6.

1. Landlord cannot maintain, for injury to premises let done by tenant during tenancy. His remedy is trespass on the case. *Carroll v. Rigney*, 804.

2. Entry upon premises by railway company and construction of railroad over same, which is no injury to inheritance, under verbal license of life tenant, is not a trespass or unlawful entry. Remainderman cannot bring trespass or ejectment. *Railroad v. Goodwin*, 280.

TRIAL. See **EVIDENCE**, 5, 6.

1. In action for personal injuries court may at trial direct plaintiff to submit to personal examination by defendants' physicians. *White v. Railroad Co.*, 150.

2. Jury are to find what words were used and their meaning, when oral bargain is made. But court may inform jury what interpretations of language used would be permissible. *Connor v. Giles*, 80.

TRIAL.

3. There must be more than a scintilla of evidence to take case to jury. *Connor v. Giles*, 80.

4. Instruction authorizing jury, in determining issue, to infer what was the fact from the evidence, "or from such personal knowledge as you may have in relation to matters of this kind," is erroneous. *Douglass v. Trask*, 804.

5. Sealed verdict is not final but within control of jury until actually rendered in court and recorded, and up to that time any jurymen may withdraw his consent. It should be presented by full jury in open court, so that jury may be polled. *Bishop v. Mugler*, 280.

6. It is in discretion of court to limit time to be occupied by counsel in addressing jury, and unless discretion is so exercised as practically to deny to accused constitutional right to have assistance of counsel, it is not error. *Sullivan v. State*, 687.

TROVER. See BAILMENT, 4, 5. BANKRUPTCY. BILL OF LADING. SALE, 5.

1. Title to property does not pass when possession is obtained by fraud. *McCrillis v. Allen*, 752.

2. Refusal to deliver *prima facie* evidence of conversion. *Singer Co. v. King*, 48, and note. See also, *State v. Stevenson*, 80.

3. Bailee or servant entitled to reasonable time to ascertain ownership; but his acting on order of principal and having no personal interest, will not further protect him. *Id.*

4. Bees are animals *feræ naturæ*, and until reclaimed are owned *ratione soli*. *Rezroth v. Coon*, 687.

5. Trespasser obtaining possession of animals *feræ naturæ*, gains no title. *Id.*

6. A., without B.'s permission, put upon tree on B.'s land empty box for bees to hive in. Box remained there more than two years, when C. took box down, took out swarm of bees and replaced box. A., after demand upon C., brought trover for value of bees, honey and honey-comb. *Held*, that action could not be maintained. *Id.*

TRUST AND TRUSTEE. See ACTION, 10. ASSIGNMENT, 10. CORPORATION, 15. EXECUTORS AND ADMINISTRATORS, 1. GUARANTY, 2. POWER. RAILROAD, 6, 7. WILL, 7, 8.

1. Orphans' Court has power to open decree settling intermediate account of trustees, in which it appears that commissions were allowed in excess of sum fixed by statute. *Jackson v. Reynolds*, 352.

2. When trust property is to be managed according to "best judgment" of trustees, their discretion and not that of the court has been confided in; court can only interfere when it is not exercised in good faith. *Veazie v. Forsaith*, 80.

3. S., wife of B., joined with him in deed to H. of land of B., in trust for use of S. during life, and at any time to convey to such person as S. might request in writing, with written consent of B. Afterwards B. made deed of land to W., in which H. did not join, and in which B. was only grantor, and S. was not described as party, but which was signed, sealed and acknowledged by S. *Held*, that this deed did not convey legal title, and was not made in execution of power reserved to S. *Batchelor v. Brereton*, 150.

4. EMPLOYEES AS FIDUCIARIES OF THEIR EMPLOYERS, 425.

ULTRA VIRES. See CORPORATION, 3.

UNDUE INFLUENCE. See EQUITY, 21. WILL, 4.

UNITED STATES. See CONSTITUTIONAL LAW, 25, 26. NEGOTIABLE INSTRUMENT.

1. Value of foreign coins, as ascertained by director of mint, and proclaimed by secretary of treasury, on January 1st in each year, in accordance with Sect. 3564 Rev. Stat. U. S., is conclusive upon custom-house officers and importers. *Hadden v. Merritt*, 688.

2. It is duty of land department, of which secretary of interior is head, to determine whether land patented to settler is of class subject to settlement under pre-emption laws, and his judgment is not open to contest by mere intruder without title, in action at law brought by patentee to recover possession. *Ehrhardt v. Hogaboon*, 550.

UNITED STATES.

3. Pre-emption laws of, imply a residence on the land both continuous and personal; though settler may be excused for temporary absences, caused by well-founded apprehensions of violence, by sickness, by presence of epidemic, by judicial compulsion or by engagement in military or naval service, or other like reason. *Bofal v. Dilla*, 422.

4. Sheriff's sale of certain buildings and lot, under judgments on mechanics' liens dating before but filed after seizure of buildings for forfeiture under internal revenue laws of United States, which forfeiture proceedings were also conducted to a sale, is void because based upon proceedings instituted while the *res* was in exclusive custody and control of United States Court. *Heidritter v. Oilcloth Co.*, 150.

5. *Semble*, that the mechanics' lien creditors might have commenced their actions, so far as that step was necessary to preserve their lien, without prejudice to jurisdiction of United States Court. *Id.*

UNITED STATES COURTS. See ERRORS AND APPEALS, 3, 4. MUNICIPAL CORPORATION, 14. PLEADING, 4. REMOVAL OF CAUSES.

1. State statute forbidding physicians to disclose professional communications, obligatory on. *Ins. Co. v. Trust Co.*, 55.

2. Sect. 721 of Rev. Stat., declaring that laws of several states, except where constitution, &c., of United States otherwise require, "shall be regarded as rules of decision, in trials at common law in the courts of the United States," relates to nature and principles of evidence, and also to competency of witnesses. *Id.*

3. A United States court having obtained jurisdiction on ground of citizenship of creditor's bill, will not lose it because of citizenship of others added as plaintiffs. Other creditors coming in under such bill can either become co-complainants, or appear before master under decree ordering reference to prove claims. *Stewart v. Dunham*, 550.

4. Bill was filed by H. B. "in his capacity as president of the New Orleans National Bank," against citizen of Louisiana, and defendant, on appeal, assigned as error want of proper citizenship to give United States Circuit Court jurisdiction. Upon inspection of whole record it appeared that suit had been treated as suit of bank. *Held*, that defendant on final hearing, in order to defeat jurisdiction, could not assert, for first time, that B. and not the bank, was complainant. *Fortier v. Bank*, 150.

USURY.

1. In case of three separate loans the note given at time of second and third loans embraced the amount previously loaned and usurious interest. *Held*, in action to foreclose mortgage given to secure payment of last note, all illegal interest should be deducted. *Beals v. Lewis*, 488.

2. Party not injuriously affected by usurious transaction cannot set it up. So if party sells land subject to mortgage given to secure debt, with usury reserved, and purchaser assumes payment of debt as part of purchase-money, such purchaser or those claiming under him, cannot interpose defence of usury to hill to foreclose mortgage. *Stiger v. Bent*, 280.

3. Where principal debtor conveyed land to surety to indemnify him against loss, and, after debt has been reduced to judgment and levy made, surety paid off execution, and thereupon brought ejectment against principal to recover land, it was no defence to allege usury in contract between principal and original creditors. *Maples v. Cox*, 352.

4. The P. L. Co. held three mortgages made by D. of different dates. Usurious interest was paid on two elder mortgages, and aggregate amount of payments exceeded amount of principal with legal interest thereon. More than three years after last payments thereon., D. filed bill for redemption of all three mortgages, and for an account, and asked that amount overpaid on first two mortgages should be applied in reduction of third. On limitations pleaded in bar of right to account, *held*, that it being conceded that there had been application of payments already made by agreement of parties to first two mortgages, those payments could not by mere operation of law be afterwards transferred to subsequent debt created by last mortgage. *Dickey v. Land Co.*, 752.

5. Rule of application of payments stated. *Id.*

VENDOR AND VENDEE. See MORTGAGE, 21. SALE, 9.

VERDICT. See DAMAGES, 2. TRIAL, 5.

VESSEL.

Joint owner of, cannot maintain action against co-owner for conversion thereof, except in case of total destruction, or something equivalent thereto, through fault of such co-owner. That co-owner has negligently damaged vessel, or run it into debt and created liens upon it beyond its value, is not sufficient. *Alderson v. Schulze*, 752.

WAGES. See ASSIGNMENT, 2.

WAIVER. See INSURANCE, 6, 25. MORTGAGE, 4. POSSESSION, 1. REMOVAL OF CAUSES, 7.

WAREHOUSEMAN. See COMMON CARRIER, 5. SALE, 3, 4.

WARRANTY. See CORPORATION, 29. INSURANCE, 26.

WASTE. See INJUNCTION, 2.

WATERS AND WATER-COURSES. See CONSTITUTIONAL LAW, 14.

1. Rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with surface water, that would otherwise escape over his own, for mere purpose of reclaiming bed of pond that had always been on his own premises. *Boyd v. Conklin*, 305, and note.

2. There is no property in underground water percolating in unknown channels, but every landowner has unlimited right of appropriating such water in its natural state by lawful, even if artificial means, and can maintain action against and enjoin anyone interfering with that right by contaminating the water. *Ballard v. Tomlinson*, 634, and note.

3. Mill-owner upon floatable river need not provide public way for passage of logs over his dam, better than would be afforded by natural condition of river unobstructed by his mills. *Pearson v. Rolfe*, 151.

4. Whenever river with mills upon it is floatable, and mill-owner and those who want to float logs are desirous of using water at same time, all parties are entitled to reasonable use of common boom; right of passage is superior but not excessive or exclusive: what is reasonable use is question of fact depending upon all the circumstances. *Id.*

WAY.

1. Existence of public way may be established by evidence of uninterrupted use by public for twenty years. *Thomas v. Ford*, 805.

2. At common law, however, principle of presumptive dedication, or quasi prescription, does not apply to give rise to right in general public to use land of individual on navigable river, as public landing, and place of deposit of wood and other articles for indefinite time. *Id.*

3. Owner has full dominion and control over land over which is ordinary highway, subject to easement in public. *Id.*

4. Railway company which has entered upon land under license from owner, and constructed its road, cannot plead such license as defence to action of trespass *quare clausum fregit*, for running its trains over said land, brought by owner thereof. A right of way can be acquired in Maryland, only by deed duly executed and recorded, as provided by statute. *Railroad v. Algire*, 805.

5. Where railway company has built road on faith of owner's license, which he subsequently revokes, court of equity will restrain him from interfering with railway company in use and enjoyment of right of way pending proceedings to have same condemned. *Id.*

WILL. See FRAUDS, STATUTE OF, 9. HUSBAND AND WIFE, 10. INSURANCE, 18.

1. Under statute requiring that will shall be attested and subscribed in presence of testator, witness must actually sign in testator's presence. *Pawtucket v. Ballou*, 805.

2. Where devise is made to class of persons not named, as "heirs at law,"

WILL.

the estate will be divided among the heirs as in case of intestacy. *Kelley v. Vigas*, 551.

3. Statute which provides for *ante mortem* probate of will is inoperative and void. *Lloyd v. Wayne Circuit Judge*, 790, and note.

4. Proceeding authorized by such statute by which questions as to competency, undue influence, &c., can be determined in advance of testator's death, is not within any recognised judicial power, and courts cannot be called upon to enforce it. *Id.*

5. Under statute providing that child unintentionally omitted from will should take *pro rata* share, child is not entitled if omission is intentional, although testator would not have entertained such intention but for mistake as to matters outside of will. *Hurley v. O'Sullivan*, 80.

6. It is not against public policy or illegal to make devise or bequest dependent upon condition that legatee should withdraw from priesthood or membership of any order or society connected with Roman Catholic Church, or refrain from forming any such connection. *Barnum v. Mayor*, 352.

7. City of Baltimore has power to accept and hold in trust, any property for educational and charitable purposes. *Id.*

8. Where property is held by municipal corporation in trust, or where the trust reposed in the corporation is for a charity, within scope of its duties, court of chancery will compel execution of trust. This jurisdiction is not founded upon statute of 43 Eliz., ch. 4, but is part of original, inherent jurisdiction of Court of Chancery over trusts. *Id.*

9. Testator directed his residuary estate to be "equally divided among my brothers and sisters and their heirs." When will was made and at testator's death, as he knew there were living three brothers, one sister, and children and grandchildren of two deceased sisters. *Held*, that heirs of deceased sisters took by representation, equally with surviving brothers and sister. *Huntress v. Place*, 280.

10. Residuary estate was willed to "my sons, S., T., B., H., J. and C. to have and to hold the same * * * to them the said S., T., B., H., J. and C., their heirs and assigns forever." *Held*, devisees being individually named and nothing in will or in testator's circumstances indicating different intent, that devisees took as individuals and not as a class; and one of the son's dying without issue before testator, that his share lapsed, and at testator's death descended to his heirs as intestate estate. *Church v. Church*, 805.

11. When testator devises his real estate to his heirs, and gives legacies to persons not his heirs, making them charge on land, it is fraud for heirs, by agreement exclusively between themselves, to procure county court to disallow will—case being there on appeal from decree of probate court establishing will—and then to divide estate solely among themselves, ignoring rights of legatees, who were minors and unrepresented. Court of Chancery, land still being in possession of heir, has power to charge legacy upon it, on ground of fraud. *Wetherbee v. Chase*, 688.

WITNESS. See CRIMINAL LAW, 2, 7. EVIDENCE, 13, 16, 17. EXPERT. MALICIOUS PROSECUTION, 3, 4. SLANDER AND LIBEL, 3.

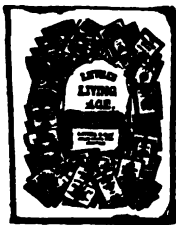
1. Defendant in proceedings, civil or criminal, who testifies in his own behalf, may be impeached like any other witness, by showing his previous conviction of felony. *State v. McGuire*, 682.

2. Evidence of character and present reputation of, for truth, admissible to rebut evidence of conviction for crime; but not evidence of innocence of crime, and in explanation of conviction. *Gertz v. Railroad Co.*, 80.

3. *Prochein ami* is not party to suit within meaning of Maryland Evidence Act. *Trahern v. Colburn*, 550.

4. In action against executor by married woman suing by her husband as next friend, he is competent witness in her behalf. And that he is directly interested in fixing liability upon estate of deceased, because of his liability over to his wife in respect of transactions as her agent, does not exclude him. *Id.*

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